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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION

ON THE DRAFT LAW ON THE STATUTE OF NATIONAL MINORITIES LIVING IN ROMANIA

on the basis of the comments by

Mr Sergio BARTOLE (Substitute Member, Italy)
Mr Pieter van DIJK, (Member, Netherlands)

I. INTRODUCTION

1. In June 2005, the Romanian authorities requested the Venice Commission to provide its expertise on the Draft "Law on the Statute of National Minorities Living in Romania" (CDL(2005)059).

2. Messrs Sergio Bartole and Pieter van Dijk were appointed as rapporteurs. A working meeting took place in Bucharest on 7-8 September 2005, which was attended by representatives of the Government of Romania including the Department for Inter-ethnic Relations, representatives of the Parliament, the Council of National Minorities, the National Council for the Prevention and Fight against Discrimination and Mr Sergio Bartole. The present opinion was sent to the Romanian authorities on 20 September 2005 and was endorsed by the Commission at its 64th Plenary session (Venice, 21-22 October 2005).

II. ANALYSIS OF THE DRAFT LAW

A. General observations

1. These comments are based on the English translation of the draft law transmitted by the Governement of Romania. This translation may not accurately reflect the Romanian original version on all points. Some of the issues raised in this opinion may therefore find their cause in the quality of the translation rather than in the substance of the draft law at issue.

2. The Commission has not been provided with an explanatory report of the draft law. Such a document would be useful to shed additional light on the intention of the drafters and could also be instrumental to determine with more precision the relation between the draft law at issue and other relevant sectoral legislation (see items C, paragraphs 12-15; E, paragraph 34; G lit. d "cultural autonomy", paragraph 74, below). It is therefore recommended that such a document, if not yet available, be prepared also to make future interpretation of the law easier, including by judicial authorities and international bodies.

3. The draft law at issue comprises 78 articles, often very detailed. The draft was originally meant to be a rather short framework law, whose function would have been to embody in a single piece of legislation only the main principles governing the status and position of national minorities.

4. During the above-mentioned meeting in Bucharest, it was, however, made clear that in the drafting process, a number of norms already expressed in other sectoral legal provisions, such the Law on Education No 84/1995 and the Public Local Administration Law No 2015/2001, have been repeated in the draft law with a view to providing a fuller picture of the existing rights and facilities available to persons belonging to national minorities. The Commission notes that, as a result, the draft law has somewhat lost its framework character by replicating a number of detailed provisions, without necessarily using the same wording and degree of detail. This at times makes the reading and interpretation of the draft law a difficult task, in particular when it comes to determining which norm is to be considered *lex specialis* (see item C, paragraphs 13-14, below).

B. Background

5. There is at present no general piece of legislation governing the statute of national minorities living in Romania, even though this country has been characterised by a rich ethnic, linguistic and cultural diversity for a very long time. A gradual development has, however, characterised the legal regime protecting national minorities, as evidenced by the adoption of important new legal guarantees, in particular in the field of education in 1999 and local public administration in 2001.

6. In recent years, a growing number of countries have enacted general laws on the protection of national, ethnic or linguistic minorities or have planned to do so. Although not a legal obligation under international standards, this is a welcome development as such legislation significantly contributes to raising the importance and visibility of the matter of minority protection, while at the same time increasing transparency. A globally positive assessment of general legislation on minority protection also results from the findings of the monitoring mechanism[1] of the Framework Convention for the Protection of National Minorities (hereinafter referred to as: the "Framework Convention").

7. The importance of the matter has recently been emphasised in Romania through the national referendum held in October 2003: as a result, Article 73, paragraph 3 lit. r of the Constitution now requires that the statute of national minorities be regulated by an organic law, which Parliament has to adopt by an absolute majority of the members of both the Senate and the Chamber of Deputies. Furthermore, the governmental programme for 2005- 2008 identifies in its chapter 25 the protection of national minorities as one of its main goals, which shall be pursued by the preparation of a draft law on the statute of national minorities living in Romania.

8. In view of the foregoing, the Commission is of the opinion that the enactment of a general law on the statute of national minorities would constitute a strong manifestation of Romania's commitment towards its national minorities and towards the preservation of the essential elements of their identities. The adoption of the current draft law, if coupled with the necessary amendments to remedy the shortcomings highlighted hereinafter, would certainly significantly contribute to reinforcing Romania as a democratic state.

9. The Commission is aware that a number of general draft laws have been in discussion for many years in Romania and understands that due to the current political context, it is the first time that Parliament is considering such a draft with good prospects for its enactment. During the above-mentioned meeting in Bucharest, the Commission's delegation was pleased to learn that early consultation on the draft law had already taken place including with the civil society and representatives of the national minorities, in particular through the Council of National Minorities.

C. Position of the draft law in the hierarchy of norms and in relation with other laws

10. The position of the draft law in the Romanian legal order is of crucial importance for its future interpretation, including because of its cross-relation with other legislation. According to Article 73, paragraph 3 lit. r of the Constitution, the draft shall be enacted as an organic law, i.e. with a higher status than ordinary laws. The Commission understands that the form of the organic law is usually chosen to stress the social importance of the matter to be regulated. The

[1] *See second Opinion of the Advisory Committee on Croatia, adopted on 1 October 2004, paragraph 8; first Opinion on Armenia, adopted on 6 May 2002, paragraph 22; first Opinion on Bosnia and Herzegovina, adopted on 6 May 2004, paragraph 54; first Opinion on Poland, adopted on 27 November 2003, paragraphs 40-41; first Opinion on Italy, adopted on 14 September 2001, paragraph 72.*

adoption and subsequent modifications of an organic law require a qualified majority in Parliament (see item A, paragraph 7, above), which ensures greater stability to this specific form of legislation.

11. Apart from the adoption and amendment procedures, there seems to be no difference in practice between organic and ordinary laws in the Romanian legal order. The Commission's delegation was told in particular that as concerns judicial protection for alleged violations of the law, the same legal remedies would be available to complainants as would have been under an ordinary law.

12. Whereas the legal form through which the draft law on the statute of national minorities living in Romania shall be adopted raises no particular difficulties, the Commission takes the view that, despite several clarifications provided during the above-mentioned meeting in Bucharest, the question of the interrelation with other sectoral legislation remains unclear. This is largely due to the fact the draft law has lost its original framework character (see item A, paragraph 4, above) by incorporating detailed regulations in key sectors. In any case, the Commission is of the opinion that provisions of the Constitution should not be repeated in the law, not even in an organic law.

13. The drafters confirmed that the principle *lex specialis derogat generali* would be a key to avoid future legal uncertainties as to which law shall be declared applicable in concrete situations. As an example, they indicated that the draft law on the statute of national minorities would certainly be considered *lex specialis* as regards the rules on cultural autonomy, but not as regards education and public use of minority languages since sectoral legislation in these fields is more detailed, although not exclusively aimed at regulating minority language teaching and public use of minority languages. The distinction is, however, not always simple to draw, especially in the field of education where the new competences of the bodies of cultural autonomy are extensive (see item G, lit. d "cultural autonomy", paragraph 74, below).

14. The Commission is of the opinion that the relations between this draft law and other sectoral legislation should be regulated with more precision in the draft itself in order to avoid, or at least significantly limit, the risk of diverging interpretations. It is indeed important that the draft law be clearly understood by those concerned, i.e. the state authorities, local authorities, bodies of cultural autonomy and persons belonging to national minorities. The principle *lex specialis derogat generali* could in particular be stated more clearly since the verb "complete" used in Article 76 does not accurately reflect this principle.

15. Consideration could be given to the possibility of systematically including, in the draft law, more precise references than "*according to the law*" (see Articles 16, paragraph 2; 29, paragraph 1; 34, paragraph 1), "*according to the legal provisions in force*" (see Article 36, paragraph 1) or "*according to the legislation in force*" (see Article 48, lit a). Also, the Commission contends that the sole guidance of Article 78, which merely states that "*at the date of entry into force of the present law any contrary disposition is abolished*", will not be sufficient to adequately deal with the above-mentioned concern of legal uncertainty in interrelations with other legislation. Such a general „safeguard clause", which is already known in Romanian legislation, seems to have been deliberately chosen by the drafters to cover all potential future sources of conflicts. It should, however, be possible to provide a list of the other provisions that would be abolished upon the entry into force of the draft law. Such a list, which would not necessarily have to be construed as exhaustive, could be included in the draft law or in an accompanying explanatory report.

D. Personal scope of application

a. Issue of terminology

16. Although the draft law mainly uses the expression "national minorities", the terms "communities" and "national communities" can also be found in certain provisions (see for example Article 4, paragraph 1, Article 9, paragraph 1 and Article 74, paragraph 1). The Commission assumes that there are no particular legal consequences attached to the use of one term or another, it being understood that the word "community" is merely used to emphasise the fact that persons belonging to national minorities often exercise their rights in community with others.

b. Definition of the term "national minority"

17. Articles 3 and 4 of the draft law contain a definition of the term "national minority" and "persons belonging to national minorities". Moreover, Article 74 provides an enumerative list of the national minorities living in Romania.

18. The inclusion of a definition of the term "national minorities" is neither indispensable to render such a law operational, nor is it required by international standards. That being said, a number of states have chosen to include such a definition and this is widely seen as acceptable, provided that the definition does not result in arbitrary or unjustified distinctions. In the course of its visit to Bucharest, the Commission's delegation understood that the adoption of a definition in the draft law is seen as an important novelty and enjoys wide support, including from representatives of national minorities.

19. The Commission is of the opinion that most of the objective elements included in the definition of Article 3, paragraph 1, namely the numerical inferiority and the elements of a specific identity expressed by culture, language or religion, do not raise any problem, given that in particular the last three are alternative and not cumulative. The subjective element of the definition, namely the wish of a national minority to preserve, express and promote its identity, does not raise any problem either.

20. This is not so, however, in respect of another objective element featured in this provision, namely the requirement that the community must have lived on the territory of Romania from the moment the modern Romanian state was established in order to qualify as a national minority. It seems that this concept intends to refer to the moment in history at which Romania was confirmed in its current frontiers. This seems to indicate that the relevant time is 1919, although the creation of modern Romania may be seen as a process rather than a definite event.

21. In combination with the definition, the draft law includes in its Article 74 a list spelling out 20 communities which are to be considered national minorities "in the spirit of this law". The main problem raised by this list lies in its apparently exhaustive character. This provision should be deleted; the interpretation and application of the general definition of Article 3, paragraph 1 of the draft law should be left to the competent authorities and, ultimately, to the competent courts. Should such a list be retained, it should be explicitly construed as non-exhaustive or indicative, not least of all because over time other communities may meet the elements of the definition.

22. The consistency between the definition and the list is not at all evident for the Commission, especially in the light of the comparison between the 1992 and 2002 census results made by the

Government of Romania in its second report under the Framework Convention[2]. Indeed, the list mentions some communities which were only to be found under the global heading "other nationalities" in the 2002 census (for example the Albanians and the Macedonians). The list also mentions the Italians which appeared as a specific category in the 2002 census but did not identify themselves as Italians in the 1992 census. Contrary to the Italians, the Csangos are not mentioned in the list even though they appeared as a specific category in the 2002 census.

23. These apparent differences in treatment prompt questions in particular as concerns the practical meaning of the requirement linked to the presence of a national minority since the creation of the modern state of Romania (Article 3) and the expression of affiliation with a national minority (Articles 3 and 4, paragraph 1). A non-exhaustive list of national minorities would thus ensure the necessary flexibility to enable the competent authorities to consider these questions further in consultation with those concerned. Should the idea of such a list be retained, the Commission would find it more appropriate to place it immediately after the definition in Chapter I.

c. Citizenship criterion

24. The Venice Commission has had a few occasions to express itself on the issue of the citizenship requirement with regard to legislation protecting national minorities. In this context, the Commission stressed that a new, more dynamic tendency to extend minority protection to non-citizens has developed over the recent past.[3]

25. Article 3 makes citizenship an element of the definition of "national minority", at least for the purposes of the draft law at issue. Bearing in mind that there is no legally binding definition of the term "national minority" in international law and that the inclusion of the citizenship requirement represents one possible interpretation of the international principles in the matter, the Commission wishes to recall that the aforementioned more recent trend consists of not making, in a general way, the enjoyment of the internationally guaranteed minority rights dependent on citizenship, except for those rights whose enjoyment is traditionally restricted to citizens (certain of the political rights, such as participation in elections at the national level; access to certain public functions; right to return in the country after having left it).

26. The Commission is aware that some authorities take the view that the text of the Romanian Constitution, in particular its Article 6, paragraph 2 read in conjunction with paragraph 1, implies that the protection of national minorities can be granted to Romanian citizens only. While this is perfectly acceptable as concerns political rights and in particular the right for national minorities to be represented in Parliament, the same reasoning is less convincing as regards cultural and educational rights, in particular because the text of the relevant constitutional provisions contains no such explicit limitation[4].

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[2] *See ACFC/SR/II(2005)004, Second Report submitted by Romania under the Framework Convention on 6 June 2005, answer to question 1, pages 49-51.*

[3] *CDL-AD (2004) 013 Opinion on « Two Draft Laws amending the Law on National Minorities in Ukraine », para. 18; CDL-AD (2004) 026 Opinion on "The revised Draft Law on Exercise of the Rights and Freedoms of National and Ethnic Minorities in Montenegro", paras 33-34.*

[4] *The Constitution of Romania, republished in 2003, reads as follows:*

Article. 6. Right to identity(1)The state recognizes and guarantees to the persons belonging to national minorities the right to preserve, develop and express their ethnical, cultural, linguistic and religious identities. (2)The protection measures taken by the state for the preservation, development and expression of the identity of the persons belonging to national minorities must be consistent with the principles of equality and non-discrimination with respect to the other Romanian citizens

27. In the case of Romania, consideration could therefore be given to follow the above-mentioned more recent trend and not to make citizenship an element of the definition of "national minority", but rather to indicate in the provisions concerned that the enjoyment of certain specific rights is restricted to citizens. Without such explicit restrictions, the assumption would be that the rights and facilities spelled out in the daft law are available both to citizens and non-citizens belonging to national minorities.

28. Removing the citizenship requirement from the definition would also eliminate certain apparent contradictions with other provisions of the draft. For example, Article 6 of the draft law provides that all individuals are equal before the law and are entitled without any discrimination to equal protection of the law. This provision, which rightly makes no distinction between citizens and non-citizens, is in conformity with Article 26 of the International Covenant on Civil and Political Rights and with Protocol No. 12 of the European Convention on Human Rights.

29. Another example is Article 7 of the draft law, which on the one hand provides in paragraph 1 that the State will take effective measures in order to promote reciprocal respect, understanding and cooperation between all citizens, irrespective of their ethnic, cultural, linguistic or religious identity. This is a wording directly borrowed from Article 6, paragraph 1 of the Framework Convention, except that the latter provision is applicable to all "persons" and not just all "citizens". It is therefore recommended to align Article 7, paragraph 1 of the draft law on the corresponding provision of the Framework Convention. This seems all the more justified that Article 7, paragraph 2 which is directly taken from Article 6, paragraph 2 of the Framework Convention, provides that the public authorities will take the necessary measures in order to protect persons who may be victims of threats or acts of discrimination, hostility or violence, because of their ethnic, cultural, linguistic or religious identity, without making any distinction between citizens and non-citizens.

30. As they stand, these provisions are difficult to be reconciled with each other as well as with the general definition referring to the citizenship requirement. In the same vein, the Commission would find it difficult to justify the restriction of certain cultural and linguistic rights to citizens only. This is notably the case for Article 5, according to which the State acknowledges and guarantees to persons belonging to national minorities the right to preserve, promote and express their ethnic, cultural, linguistic and religious identity. This is also the case for certain linguistic rights that will be addressed elsewhere in this draft opinion (see item E, paragraph 36, below), as well as for the membership of the organisations mentioned in Article 39, paragraph 1 lit. b (see item G, lit. b "organisations of citizens belonging to national minorities", paragraphs 56-57, below). Furthermore, the exclusion of non-citizens - at least those belonging to a national minority recognised by the draft law - from the whole system of cultural autonomy is highly questionable.

E. Public use of minority languages

31. Under Chapter II of the draft law, Section 5 contains several provisions governing "the use of mother tongue". Article 31 thus provides for the right to use minority languages for public purposes in those "administrative-territorial units where the citizens belonging to a national minority have a significant percentage, in the conditions of the Public Local Administration Law No 215/2001".

Article. 32(…). (3) The right of persons belonging to national minorities to learn their native language, and their right to be educated in this language are guaranteed; the ways to exercise these rights shall be regulated by law. (...)

32. The exact meaning of the term "significant percentage", which is in itself too vague a concept, is of such vital importance for the application of this and other articles (see Article 37) that the authorities and the recipients of the law need sufficient guidance to implement it[5]. It is therefore of crucial importance that Article 31 makes an explicit reference to the Public Local Administration Law No 215/2001, which contains a 20% threshold that will be rendered applicable also in the draft law on the statute of national minorities. This will indeed represent a positive step fully in line with international standards[6].

33. The Commission understands the concern of the drafters who have preferred not to repeat the 20% in Article 31 of the draft law, so as to avoid reopening the political debate on this threshold. The Commission nevertheless notes that the reference to the "significant percentage" is not consistently used in Articles 31 to 38. As a logical consequence and unless otherwise specified, it seems that the articles not mentioning it, such as Article 34, paragraph 2 (right to conclude a marriage in a minority language), should not be subject to the threshold deriving from the Public Local Administration Law No 215/2001. In such cases, it may be useful to include other criteria in the draft law as it is hard to imagine that such linguistic rights will in practice be available without any limitation.

34. In the provisions of this Section 5, the draft frequently uses the expressions "in the conditions of the law" (see Article 32), "according to the law" (see Article 34, paragraph 1) or "according to the legal provisions in force" (see Article 36, paragraph 1). These references, which are not further specified, make it extremely difficult for those concerned to know which additional conditions are placed on the public use of minority languages in the various contexts at issue, such as the issuance of normative documents by the central public authorities and the use of minority languages before law courts. Some more precise references to the relevant laws should therefore be included in the text of the draft or at least in an explanatory report in order to remedy this legal uncertainty (see related comments under item C, paragraph 14, above).

35. As concerns ways and means to make the public use of minority languages effective in practice, the draft law provides for the need to ensure language training of the public officers concerned, as well as for the possibility to resort to authorised translators (Article 36, paragraph 1). The draft, however, does not indicate which solution must prevail in what circumstances: is the choice left to the discretion of the authorities ? Does the choice depend on the percentage of persons belonging to national minorities living in the administrative-territorial unit concerned ? Are the economic capacities of the authorities of any relevance ? The Commission suggests that the draft law be completed in order to give further guidance on these important questions.

36. The Commission is of the opinion that reserving the linguistic rights listed under Section 5 to citizens only and thereby not extending them to non-citizens can hardly be justified (see related comments under item D, paragraphs 24-30, above). Non-citizens may indeed speak certain minority languages which already enjoy protection under the draft law. For example, for those persons belonging to a national minority who are residents in Romania but (still) do not have the special bound of citizenship, registration of their name and surname in the minority

[5] *Article 120, paragraph 2 of the Constitution simply refers to "the provisions of the organic law" to further specify this expression.*

[6] *See first Opinion of the Advisory Committee on Romania, adopted on 6 April 2001: "The Advisory Committee notes that the Parliament adopted in early 2001 a Law on local public administration. The Advisory Committee welcomes the fact that this Law would expressly authorise, inter alia, the use of minority languages in dealings with local authorities in areas where minorities account for more than 20% of the population. This possibility, which would constitute an important step in the implementation of the Framework Convention, would put an end to the legal uncertainty now prevailing in this area", para. 49.*

language would seem important (see Article 33). Similarly, a distinction between citizens and non-citizens would seem inappropriate and even problematic in practice as regards the linguistic situation of detainees (Article 35), as well as patients in sanitary institutions and centres (see Article 37). As concerns the latter provision, it would also seem strange not to take into account those residents who feel they belong to a recognised national minority, but are not yet Romanian citizens, in determining whether the requirement of a "significant percentage" is fulfilled.

F. Judicial protection of the rights enshrined in the draft law

37. As the Commission already noted, that the draft law seems to combine both programme-type provisions and provisions granting rights that might be enforceable before domestic judicial authorities. It is, however, often difficult to discern whether a particular provision falls within one or the other category. The question is important *inter alia* as regards judicial protection, since individual applications lodged with courts can in principle only relate to a violation of enforceable rights.

38. Such difficulties can be found in provisions pertaining to education. Article 17 contains a long list of obligations for the state, which shall probably require the adoption of implementing regulations, unless the existing provisions in the field of education are considered sufficient. Article 18 of the draft, which is closely linked to Article 17, provides for the consultation and even in some cases binding consent of the representatives of national minorities not only for the establishment, elimination and functioning of the competent public educational units and institutions, but also for the appointment or change of their management.

39. In this context, the question may arise as to whether the positive advice given by the representatives of a minority excludes the right of a person belonging to that minority to lodge an individual complaint on the ground that he or she would consider to be affected by the decision adopted on the basis of that advice. In this respect, the draft law does not provide clear rules concerning the legal protection by the ordinary civil or administrative courts. If the approval by the representatives of the minorities may be deemed to introduce a preventive guarantee for the adequacy of the implementing measures, the possibility of a successive judicial control of the matter is generally required by the international instruments in the field of the human rights. It is therefore recommended that further guarantees on the judicial control and the legal remedies be included in the draft law. A strong protection of the individual is indeed all the more required since important rights are granted to the community, in particular through the system of cultural autonomy.

G. Participation

a. General remarks

40. The overall question as to whether persons belonging to national minorities living in Romania are ensured an effective participation in cultural, social and economic life and in public affairs, in particular those affecting them, is not easy to answer. Minority participation is promoted through a range of measures and special structures within the executive branch. Furthermore, there are important institutional elements of participation in Romania such as minority representation in Parliament, the Council of National Minorities and the newly envisaged system of cultural autonomy.

41. The Commission is not in a position to assess whether or not this institutional framework actually results in an effective participation of persons belonging to national minorities in public life. This would require an in-depth monitoring of the situation, including on how the existing system is implemented in practice. Such a monitoring is periodically conducted under the

Framework Convention, where the latest evaluation *inter alia* strongly welcomed the constitutionally guaranteed representation in Parliament, but at the same time stressed certain shortcomings in the consultation of the Council of National Minorities[7]. The Commission can therefore not exclude that it may ultimately prove necessary to reinforce the participation of representatives of national minorities in the decision-making process[8].

b. Organisations of citizens belonging to national minorities

42. One of the essential features of the protection of national minorities in Romania is their guaranteed representation in Parliament[9]. This minority representation is ensured in practice through the participation of the so-called "organisations of citizens belonging to national minorities" in the election process[10]. While persons belonging to national minorities are free to organise themselves in "associations" for the purposes of Governmental Ordinance No 26/2000, they have to meet a number of additional conditions if they want to take part in elections. These conditions are set out in Article 7 of Law No. 67/2004 on Local Elections, on which the Venice Commission adopted a critical opinion[11].

43. Chapter III (Articles 38 to 50) of the draft law on the statute of national minorities living in Romania is entirely devoted to the organisations of citizens belonging to national minorities. Articles 49 recalls that they may take part in the local, parliamentary and presidential elections[12] and Article 50 indicates that, in doing so, they are assimilated to political parties.

44. The organisations of citizens belonging to national minorities have so far not received public recognition in the Romanian legislation. Several representatives of national minorities contend that Governmental Ordinance No 26/2000 on associations and foundations, which is rather liberal as it sets out very few legal conditions for creating an association, has failed to acknowledge their specific function and nature, which is to help a national minority to preserve and express its cultural, linguistic and ethnic identity while ensuring, at least to an extent, its representation.

45. Notwithstanding the restrictive nature of the conditions placed on the registration of the organisations of citizens belonging to national minorities (see paragraphs 46-51, below), the Commission takes the view that the inclusion, in the draft law, of a chapter dealing with these organisations constitutes a marked improvement in that it entails public recognition of their role.

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[7] *See first Opinion of the Advisory Committee on Romania, adopted on 6 April 2001, paras 65-66.*

[8] *During their meeting with the Commission's delegation in Bucharest, some members of the Council of National Minorities suggested to provide for the compulsory consultation of this body by the Authority for Inter-Ethnic Relations in Article 55, paragraph 5 of the draft law.*

[9] *See Article 62, paragraph 2 of the Constitution which states: "Organisations of citizens belonging to national minorities, which fail to obtain the number of votes for representation in Parliament, have the right to one Deputy seat each, under the terms of the electoral law. Citizens of a national minority are entitled to be represented by one organisation only".*

[10] *Article 39 of the draft law reads as follows: "(1) The organisations of citizens belonging to national minorities may be established in one of the following modalities: (…) b) according to this law, for the organisations of citizens belonging to national minorities stipulated at Article 62 (2) from the Constitution, which take part at the parliamentary, presidential and local elections. (2) (…)".*

[11] *CDL-AD (2004) 040 Opinion on « The Law for the Election of Local Public Administration Authorities in Romania », paras. 18.*

[12] *This right is already expressed in Article 62, paragraph 3 of the Constitution.*

This role is indeed not properly reflected in the current regulations contained in Law No. 67/2004 on Local Elections.

aa. Conditions for registration

46. Article 40 sets out the conditions organisations of citizens belonging to national minorities have to meet in order to be registered as such. Paragraph 2 of this provision stipulates that "the number of members of a minority organization may not be smaller than 10% of the total number of citizens who declared their affiliation to the respective minority at the last census". This represents a lower threshold than the 15% contained in the Law on Local Elections. While acknowledging this as an improvement, the Commission is still of the opinion that a 10% threshold of this type would be too restrictive a condition. This is especially the case for those organisations which operate at the local level in administrative units where there is a concentration of members of the minority concerned, but which cannot meet the requirement of 10% at the national level.

47. The same holds true for the requirement in Article 40, paragraph 3, which states: "in case 10% in the last census is equal to or surpasses 25.000 persons, the list of founding members must contain at least 25.000 persons, *domiciled in at least 15 counties from Romania, but no less than 300 persons for each of these counties*". This is also likely to exclude the founding and registration of organisations at the local level in units where there is a significant concentration of persons belonging to a sizeable minority at national level. It is true that Article 46 provides for the possibility to establish territorial divisions within any organisation of citizens belonging to a national minority, but this does not satisfactorily address the excessive difficulty to set up another, distinct organisation.

48. There is a legitimate concern for the state to introduce some legal safeguards for associations to be authorised to take part in elections as "organisations of citizens belonging to national minorities". It is therefore perfectly understandable that the state expects serious guarantees of representativity from such organisations as electoral privileges must not be abused. However, the Commission is of the opinion that the conditions for registration may not be of such a severity that they disproportionably favour groups which are represented in Parliament to the disadvantage of (new) groups which wish to participate in public life[13]. In the draft law at issue, the proposed restrictions, which (with the exception of the 10% threshold) largely mirror the corresponding provisions of the Law on Local Elections, are not reasonable and do not meet the requirement of proportionality.

49. This is all the more problematic since electoral privileges are not the only element at stake. Indeed, in addition to participation in elections, the qualification as "organisations of citizens belonging to national minorities" entails several competences listed in Article 48 of the draft law. These competences include the right to be represented in the Council of National Minorities, the right to administer special funds and receive yearly allowances from the State budget[14], the right to propose the appointment of representatives in certain institutions and to notify the National Council for Combating Discrimination of cases of discrimination.

50. As a consequence, the whole Chapter III of the draft law may potentially result in excluding significant parts of national minorities from representative and consultative bodies, as well as

[13] *CDL-AD (2004) 040 Opinion on « The Law for the Election of Local Public Administration Authorities in Romania », paras. 45.*

[14] *According to Article 55(5) lit. i, the Authority for Inter-Ethnic Relations shall "grant financial assistance to the organisations of citizens belonging to national minorities (…)".*

from a range of participation rights, which would seem out of proportion[15]. Indeed, the organisations of citizens belonging to national minorities are associations and the conditions they are required to fulfil to be registered have to be analysed as restrictions to the freedom of association. If the authorities consider that more restrictive conditions are necessary for these organisations to be allowed to take part in elections, it is recommended to reserve only the competences spelled out in Article 48 lit a to the organisations mentioned in Article 39, paragraph 1 lit. b; by contrast, the competences spelled out in Article 48 lit b to h should not be excluded for organisations of national minorities mentioned in Article 39, paragraph 1 lit. a. Article 47 of the draft law, which will oblige the organisations already represented in Parliament and/or in the Council of National Minorities to re-register, does not seem able to remedy this inherent shortcoming of the system.

51. While the Commission has serious concerns about the aforementioned conditions for registration, it considers it extremely positive that the election process leading to the setting up of the National Councils of Cultural Autonomy has been conceived in a much more open way. Article 62, paragraph 5 indeed makes it clear that the members of the organisations mentioned in Article 39, paragraph 1 lit. a and lit. b will all be allowed to stand as candidates. This arrangement will ensure a fair electoral competition, without unduly favouring the candidates from the organisations of citizens taking part in the parliamentary, presidential and local elections.

bb. Data protection

52. The Commission notes that the registration process of organisations of citizens belonging to national minorities necessarily requires to process personal ethnic data. In this context, it is essential to make sure that individual declarations of affiliation made in the census, which are mentioned in Article 40 as a tool to evaluate the numerical size of the minority concerned, cannot be publicly disclosed. The list of the signatures of the members of the organisations, mentioned under Article 42, should also be protected in an appropriate way. It is self-evident that any special voting system for national minorities require that the voters and the candidates reveal their belonging to a minority[16]. This does not mean, however, that the list of voters should be made publicly accessible. There are indeed many possibilities to secure the confidentiality of these personal data.

53. It is thus necessary either to introduce in the draft law certain guarantees ensuring protection for ethnic data or at least make an explicit cross-reference to such guarantees if they are already entrenched in other legislation. Only those "persons belonging to the national minority whose Council is going to be established" will be entitled to elect their National Council of Cultural Autonomy (see Article 62, paragraph 1 of the draft law), but the Commission understands that it

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[15] *In this context, it is worth recalling that the Advisory Committee on the Framework Convention expressed similar concerns about these negative effects for those associations wanting to compete with the ones already represented in the Parliament. See first Opinion of the Advisory Committee on Romania, adopted on 6 April 2001: "The Advisory Committee notes that the above institutional arrangements give considerable weight to one organisation for each minority, for instance the organisation represented in Parliament and/or the Council of National Minorities. This preferential treatment is reinforced by the fact that this organisation receives most of the financial aid allocated by the state to the minority concerned. This creates a risk that other organisations representing that minority may to some extent be sidelined and may not receive adequate state support. This risk is probably greater for the Roma community, which is represented by several dozen organisations and is thus more fragmented. It is therefore important that in the allocation of state support, the Government proceeds not exclusively through the organisations represented in Parliament and/or the Council of National Minorities, but also through the channel of other organisations representing minorities", para. 67.*

[16] *CDL-AD (2004) 026 Opinion on "The revised Draft Law on Exercise of the Rights and Freedoms of National and Ethnic Minorities in Montenegro", para 52.*

is not the intention of the authorities to set up a specific register of "minority" voters. Everyone who declares to belong to a given minority will therefore be entitled to take part in the election of the corresponding Council of Autonomy The list of those who took part in the elections should, however, not be used by the uthorities for other purposes and its acess should be restricted.

54. Introducing the proposed guarantees to protect ethnic data would contribute to fully respecting the right not to disclose one's affiliation with a national minority, which is in keeping with Article 3 of the Framework Convention. It is to be welcomed that Articles 4 and 13 of the draft law partly reflect this principle. However, both provisions make this right dependent on other legislation ("in compliance with the law" and "except the cases mentioned in the law", respectively). This weakens the right not to declare one's affiliation with a national minority. Exceptions to this right should therefore be more clearly defined, serve a legitimate aim and be proportionate to that aim.

cc. Other issues

55. Article 40, paragraph 4 which determines that no more than 25% of the members of an organisation of citizens belonging to a national minority may be persons who do not belong to the minority concerned, is questionable and can prove extremely difficult to monitor in practice. Article 40, paragraph 5, which prohibits membership of two organisations belonging to the same minority, also raises questions. Both provisions amount to a strong interference with the freedom of association as guaranteed in Article 11 of the European Convention on Human Rights, and their justification is not obvious.

56. The draft law seems to imply that the organisations may consist of citizens only, since the term is explicitly contained in the expression "organizations of citizens belonging to national minorities". It is, however, difficult to understand why these organisations, which will be established to promote and protect the identity of the national minority concerned, should be prevented from extending their activities to non-citizens resident in Romania who belong to the same minority, and why those non-citizens should *ex lege* be barred from becoming members of these organisations. This point needs further clarification, particularly in view of the fact that the competences assigned to these organisations by far exceed electoral privileges.

57. The Commission acknowledges that it may be legitimate for the state to restrict to citizens only the right for these organisations to take part in parliamentary and presidential elections. The draft law, however, also seem to imply that only citizens belonging to these organisations may participate in local elections. This is not in violation of any imperative rule of international or European law concerning universal suffrage. However, a tendency is emerging to grant local political rights to foreign residents. The Commission can therefore only echo its earlier recommendation to introduce the possibility for stable resident non-citizens to take part in local elections in Romania[17]. This could constitute a significant progress in terms of participation of those non-citizens belonging to national minorities.

d. Cultural autonomy

58. Chapter V of the draft law exclusively deals with the concept of "cultural autonomy", which would constitute a novelty in the Romanian legal order. The Commission notes that there is no internationally accepted model of cultural autonomy for national minorities. Although international standards and principles are somewhat missing in this matter, cultural autonomies

[17] *CDL-AD (2004) 040 Opinion on « The Law for the Election of Local Public Administration Authorities in Romania », para. 9.*

have been recognised, despite frequent shortcomings, as potentially instrumental for the implementation of Article 15 of the Framework Convention[18] and the OSCE Lund recommendations consider non-territorial forms of self-governance, including cultural autonomy, useful for the maintenance and development of the identity and culture of national minorities[19].

59. The introduction of a model of cultural autonomy for national minorities may thus be considered a positive and useful step to reinforce their participation in public affairs, in particular in those countries where national minorities account for a significant proportion of the total population and where there are shortcomings in the existing scheme of participation. Whether or not this diagnosis applies to Romania is a question that ultimately needs to be given a political response by the authorities, in consultation with those concerned. At any rate, the form of cultural autonomy contained in the draft law would ensure real decision-making powers to the representatives of national minorities mainly through their binding consent, and not just consultation rights as is the case in some other countries.

aa. Group rights and binding consent

60. Chapter V of the draft law implements what could be described as the collective dimension of the protection granted to national minorities. Indeed, the main feature of a system of cultural autonomy is that it goes beyond the mere recognition of rights to persons belonging to national minorities. This is reflected in Article 57, paragraph 1 of the draft, which defines cultural autonomy as the right of a national community to have decisional powers in matters regarding its cultural, linguistic and religious identity, through councils appointed by its members.

61. The first part of the draft, and in particular Chapter I and Chapter II, seems to favour the protection of national minorities through individual rights, although Article 20 of the draft mentions at the same time cultural guarantees for persons belonging to national minorities and the right of national minorities to public cultural institutions. This is evidenced by the frequent use of the expression "persons belonging to national minorities" when rights are stipulated. In order to strengthen its internal coherence, the draft law could make clearer - especially in its first two chapters - that it aims at combining individual protection with protection granted to the group. This second dimension is particularly prominent in Chapter V of the draft law through the binding consent that needs to be obtained from the Councils of National Minorities. The combination of both individual and group protection and their proper articulation in the draft law also need to be taken care of as concerns the judicial protection (see item F, paragraph 39, above).

62. It is true that the international principles in the matter show a clear preference for the protection of the minorities through individual rights, but they do not prohibit the adoption of means of collective protection[20], for example through group rights as this may also be a means to ensure minority participation in public affairs. As a matter of fact only cultural institutions can, in cooperation with the public authorities, implement the policy of promotion and

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[18] See second Opinion of the Advisory Committee on Estonia, adopted on 24 February 2005, paragraphs 66-69; second Opinion on Croatia, adopted on 1 October 2004, paragraphs 164-170; first Opinion on Hungary, adopted on 22 September 2000, paragraph 46; first Opinion on the Russian Federation, adopted on 13 September 2002, paragraphs 43-45; first Opinion on Ukraine, adopted on 1 March 2002, paragraph 32.

[19] See Recommendation 17 of the Lund Recommendation on the effective participation of national minorities in public life and corresponding explanatory note.

[20] See para 13 of the explanatory report of the Framework Convention, which simply states that the Framework Convention "does not imply the recognition of collective rights".

preservation of the historical and present culture of national minorities. Moreover, the exercise of rights in community with others, including rights for persons belonging to national minorities, is often an emanation of the freedom of association.

63. The draft law provides for the compulsory consultation of the bodies of cultural autonomy in a number of instances and, in some cases, even requires the binding consent of these bodies. This binding consent is mostly linked to the appointment of staff members with managing responsibilities in educational, cultural and media institutions. In this context, Article 58 lit. g to j uses different expressions like "appointment of the management", "approval of the appointment of the management" and "proposal of the appointment of the management". Such forms of binding consent, which are not further specified in the draft law since Articles 18, 21 and 26 are not more prescriptive, may raise concerns as to their practical meaning and their compatibility with the general principles applicable to public competitions organised to fill vacant posts within the civil service.

64. The respective nomination procedures will inevitably necessitate frequent contacts between the competent authorities and the bodies of cultural autonomy in order to find compromises acceptable for both sides. This will be a learning process, which should take place in a spirit of co-operation rather than confrontation. For example, proposals have been made that the bodies of cultural autonomy could select a short list of candidates who meet the requirements of expertise and sufficient knowledge of the language and culture of the minority concerned. The state authorities responsible for the nomination would then appoint the successful person among the short-listed candidates, following a fair competition in compliance with the existing rules, including the same legal remedies for the unsuccessful candidates.

65. The Commission is of the opinion that the draft law could provide more guarantees in this respect, without of course it being possible to regulate in all details the way in which these appointments shall take place.

bb. Relationship between institutions of cultural autonomies and other bodies

66. Since the notion of cultural autonomy is not known yet in the Romanian legal system, care should be taken to circumscribe it with precision. According to the draft law, the envisaged cultural autonomy should lead to the setting up of new institutions entrusted with wide-ranging competences in the fields of education, culture, media, historical monuments and cultural heritage. Although Article 61 labels these institutions "autonomous administrative authorities with juridical personality", the Commission recommends that their legal nature be further specified in the draft law in order to clarify important issues: will they be entitled to issue administrative decisions and, in the affirmative, which rules of procedure and legal remedies will be applicable ? What type of responsibility will their organs bear ?

67. The new institutions of cultural autonomy will coexist with several actors partly exercising the same or at least similar competences: the state authorities (including the Authority for inter-Ethnic Relations), the parliamentary committee for human rights, denominations and minorities, the Council of National Minorities and the organisations of citizens belonging to national minorities. It is therefore essential to clarify in the draft law the respective role of the Councils of Cultural Autonomy, especially *vis-à-vis* the Council of National Minorities and the organisations of citizens belonging to national minorities bodies. This would avoid any unnecessary overlapping of competences. It is equally important to regulate in detail the relations between the Council of National Minorities and the state authorities. Failure to do so would create legal uncertainty, potentially lead to numerous legal controversies and thereby seriously complicate the implementation of the system in practice.

68. In view of the foregoing, the Commission is of the opinion that the articulation between Chapter III and Chapters I and II of the draft law would merit further consideration with a view to clarifying it. For example, some articles refer to the need "take into account the will of" or "consult" the representatives of national minorities, without specifying through which bodies this shall be done (see Article 11 and 18, paragraph 1) or whether individuals claiming to represent a minority may also have a say in these matters.

69. The relations between the Councils of Cultural Autonomy and the state authorities could be the object of a specific, more detailed, section setting out the main principles applicable in this regard. In the current draft, only isolated and dispersed provisions touch upon this important question. For example, Article 71, paragraph 1 lays down the general possibility to "delegate" further competences to the Councils of Cultural Autonomy. Certain provisions explicitly provide for the necessity to get the "prior approval" of or at least "consult" the National Council of Cultural Autonomy in the fields of education (Article 18, paragraphs 1, 2 and 5), culture (Article 21 paragraph 1) and media (Article 26, paragraph 2). In the list of competences granted to the Councils of Cultural Autonomy by Article 58, different notions are used, such as "in partnership with public competent authorities (see lit. c, d, f) and "participation in the elaboration of strategies and priorities" (lit. e).

70. The scattered use of such notions makes it extremely difficult to identify the main rules governing the relationship - including from a budgetary perspective - with the public authorities. The mere reference, in Article 60, to the principle of "decentralisation" and "subsidiarity" in the exercise of the competences listed under Article 58 is not sufficient to deal with this concern. The reference to the latter principle in this context is even confusing since the Commission understands that the drafters have used it to stress the fact that the system of cultural autonomy will remain optional in the sense that each minority will be free to use it or not.

71. The same holds true for Article 72, which rightly establishes the competence of the administrative courts to solve legal disputes arising between the National Council of Cultural Autonomy or County Committees and the state authorities. It may also be necessary to provide for the possibility to conclude agreements between the national minority concerned - through its Councils of cultural autonomy - and the relevant public authorities to substantiate this notion of "partnership" with the authorities.

72. The main rule governing the relationship between National Councils of Cultural Autonomy and organisations of citizens belonging to a national minority is enshrined in Article 59, paragraph 2 of the draft law. This is a useful provision aimed at avoiding a duplication of tasks which suggests that National Councils will largely substitute themselves to organisations of citizens belonging to national minorities. There is no such provision on the relationship between National Councils of Cultural Autonomy and the Council of National Minorities, although the duties assigned to the latter by Article 53 suggest many possible overlappings with the competences of the Cultural autonomy of national minorities in fields such as education, culture and media.

73. Bearing in mind that the election process leading to the establishment of the National Councils of Cultural Autonomy is to be carried out by the organisations of citizens belonging to national minorities, it is important that the task to regulate it remains with the Government - through a legislative delegation - and that the Permanent Electoral Commission is entrusted with its supervision (Articles 62) as these are essential guarantees for the fairness of the voting procedure[21]. The Commission is of the opinion that the draft law could be clearer in addressing

[21] *See CDL-AD (2004) 026 Opinion on "The revised Draft Law on Exercise of the Rights and Freedoms of National and Ethnic Minorities in Montenegro", para 60.*

the modalities for the establishment of a National Council of Cultural Autonomy for a national minority which has more than one organisation. In this context, the Commission takes the view that Article 73 of the draft law either is not clearly drafted or entails the possibility of unequal treatment of different organisations within the same national minority by requiring for an organisation of a national minority that it participates in the elections with a certain result in order to be considered as representative and legal. This provision would seem to hamper political diversity. The Commission recommends a rephrasing of the provision to exclude the consequances mentioned here.

cc. Interrelations with other legislation

74. The relation with other sectoral constitutional and legal provisions is another area which needs further clarity. For example, the reading of the competences assigned by Article 58 to the cultural autonomy of national minorities in the educational field, taken in conjunction with section 1 of Chapter II (Education of national minorities), leaves the general impression that national minorities would have a stronger say in the organisation, administration and control of the minority educational system. It is, however, extremely difficult to determine more precisely what changes will be brought to the current system[22]. For example, is the proposed intervention of cultural autonomies in the organisation, administration and management of private educational institutions with teaching in minority languages (Article 58 lit. c and g) a complete novelty ? Who can decide between the establishment of minority language teaching within the public education system and the establishment of private educational institutions ?

75. Another important area, namely the possibility to levy taxes in order to ensure the functioning of the institutions of cultural autonomy, is only briefly mentioned in the draft law (Article 58 lit. l) without further practical guidance on how to put such a system in place except that this should be made "in compliance with the law". The draft law contains no indication whatsoever on key issues such as the nature of the taxes (income tax, per capita contribution, etc.), as well as the circle of persons who would have to pay them.

III. CONCLUSIONS

76. The draft law contains provisions which, in principle, constitute a satisfactory framework for the protection of minority rights in Romania. It therefore merits an overall positive appreciation.

77. The draft law contains, however, certain important limitations and several uncertainties as to its meaning and scope. It is recommended to address these shortcomings with the necessary amendments, with a view to making the draft more easily operational and improving its quality. This would also ensure that the draft is fully in line with international standards.

78. The Commission recommends, as a matter of priority, to improve the way in which the cross-relation between the draft law and other sectoral legislation is regulated (see paragraphs 2, 12 to 15, 34 and 74 of the present opinion). In this context, it is recommended to specify the references to other laws and legal regulations and to better reflect the principle *lex specialis derogat generali*.

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[22] *According to the second report of Romania under the Framework Convention submitted on 6 June 2005 (pages 18-19), the legal framework on minority education is governed by Article 32 of the Constitution and Articles 5, 8 and 118 to 126 of the Law on Education No 84/1995 republished on the basis of Article II of Law No. 151/1999.*

79. It is also essential to address potential overlapping between the relevant institutions and the duplication of their tasks stemming from a lack of coordination in the envisaged system of cultural autonomy (see paragraphs 68 to 72 of the present opinion).

80. In order for the draft law to better comply with the freedom of association, the conditions for the registration of the so-called "organisations of citizens belonging to national minorities" should be eased (see paragraph 50 of the present opinion).

81. The recommendations of the Commission to better circumscribe the meaning and scope of the minority rights guaranteed in the draft law, as well as to strengthen their judicial protection, would provide additional guarantees for the individuals (see paragraphs 39, 61 and 64 to 65 of the present opinion).

82. Finally, the Commission suggests that the authorities reconsider the opportunity to keep the citizenship as a general requirement of the definition and study the possibility to mention it only with respect to those rights where it appears a necessity (see paragraphs 27 to 30 of the present opinion). By the same token, consideration should be given to reviewing the exhaustive character of the list of minorities accompanying the definition (see paragraph 23 of the present opinion).