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OBSERVATIONS

ON THE DRAFT LAW ON THE STATUTE OF NATIONAL MINORITIES

OF THE REPUBLIC OF ROMANIA

by

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The Romanian draft-law on the statute of national minorities.

The draft-law on the statute of national minorities living in Romania adopted by the Romanian Government on May 19th, 2005, is divided in five chapters dealing with the general provisions, the preservation, expression and promotion of national identity, the organizations of citizens belonging to national minorities, the Council of national minorities and the Authority for inter-ethnic relations, the cultural autonomy.

1.The general provisions offer a definition of the national minorities living in the territory of Romania from the moment of the establishment of the modern Romanian state (art. 3). This definition accepts one of the possible interpretation of the international principles in the matter, that which requires the Romanian citizenship of the persons belonging to the national minorities: therefore it excludes from the scope of the protection people who are not Romanian citizens. In view of a complete evaluation of the draft it could be interesting to get an explanation about the ways of the protection of people belonging to national minorities who are not Romanian citizens. Moreover the coherence of this definition with the list of the national minorities recognized in Romania contained in art. 74 has to be checked as far as the list mentions some communities (that is, Albanese, Ruthenian and Macedonian) which were not explicitly included in the census of 2002, and were not registered in the census of 1992 (Italian and Csangos) (see the informations of the second report submitted by Romania in compliance with the Framework convention for the protection of national minorities). This difference allows the question whether communities defined as " others " in the second report are covered by the definition, on one side, and, on the other side, whether communities which were not apparently present in 1992, can be defined as minorities living on the territory from the moment of the establishment of the modern Romanian state.

The question is specially interesting the implementation of the law because the present existence of a minority depends on the free and unhindered expression of the affiliation of the persons belonging to that national minority: has this expression of affiliation to be present to-day or to have been present from the moment of the establishment of the modern Romanian state?

2.The general provisions connect the protection of the national minorities with the principle of non discrimination (right to the equal protection of the law) and the encouragement of the spirit of tolerance and intercultural dialogue. The rules don't provide for the specific consequences of the threats or acts of discrimination. Shall the authors of these threats and acts be criminally punished? What does the contraventional responsibility mentioned in art. 8 mean? Shall the legal acts of public authorities and of private persons conflicting with art. 6 be invalid?
The draft law does not mention the judicial procedure which the interested persons should introduce when complaining the violation of art. 6 in courts. Moreover the content of the contraventional or penal responsibility of the persons committing the deeds stipulated in art. 12.1 is not clearly stated. Therefore the provisions of artt. 7, 8, 12 and 13 have apparently only a programmatic relevance and require the adoption of specific legislative rules aimed at their implementation. The general provisions have only a programmatic relevance and require the adoption of specific legislative rules aimed at their implementation. It is doubtful that they could be directly enforced by the judicial authorities.

3. The content of the protection of the national identity of the persons belonging to national minorities is provided for by the rights stipulated by the Chapter II of the draft-law.

With regard to the educational rights art. 17 contains a long list of the obligations of the state to guarantee the adoption of the necessary interventions and measures. Also these provisions require a further legislative implementation. Therefore the content of the protection cannot be evaluated at this stage, while the fitness and the extension of the protection depends on the judgement of the representatives of the concerned national minorities which have to be compulsory consulted (art. 18). The approval of the relevant minority bodies is required not only for the establishment, elimination and functioning of the competent public educational units and instituitons, but also for the appointment or change of their management. It should be underlined that the approval is required not only for the appointment of the persons in charge of the directive and managerial positions of the instituitions interested, but also for the appointments of the teaching staff, at least as far as the teaching in mother tongue is concerned.

Does the positive advise of the representatives of a minority exclude the right of a person belonging to that minority to complain becuase he/she thinks to be damaged by the decision adopted on the basis of that advise?

It could be that the implementation of the educational rights mentioned in Chapetr II, 1, requires the adoption of regulations by the Cabinet or by the Ministery of education and research, also in view of the establishment of a correct relation between the relevant state's authorities and the representatives of the minorities. The approval of these regulations by the representatives of the minorities should also be required to insure a correct implemetation of the provisions of the law.
Moreover the draft-law does not provide clear rules entrusting the protection of the concerned rights to the ordinary judicial authorities or to the administrative courts. If the approval by the representatives of the minorities introduces a preventive guarantee of the adequacy of the measures which will be adopted, the possibility of a successive judicial control of the matter is required by the international instruments in the field of the human rights and civil liberties.

4. The first part of the draft apparently chooses the way of the protection of the minorities through the entrusting the persons belonging to them with individual, personal rights. But there is an evident difference between this choice and the following rules providing for the guarantee of the culture of national minorities as it is identified with the protection and preservation of their cultural inheritance and the promotion of the contemporary creativity. 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 don't forbid the adoption of means of collective protection, for example through collective rights. In art. 20 we can see the sign of the adoption of both these alternatives when the draft-law mentions, at the same time, the cultural guarntees of the persons belonging to national minorities and the rights of national minorities in the field of public cultural institutions.
As a matter of fact only cultural institutions can, in cooperation with the public authorities, implement the policy of promotion and preservation of the historical and present culture of the national minorities.

This internal articulation of the structure of the draft-law implies that also institutions of the national minorities should have the right of claiming the judicial protection of their interests when it is difficult or impossible to get the cooperation of the public authorities in pursuing the protection of the culture of a minority.

5. The same ambiguity is present in the section 3 devoted to mass-media where the right of expression of the persons belonging to national minorities has to be implemented through the allocation of a significant percentage of the regional radio or tv shows to the national minorities upon fundamented request from the national minorities themselves. Only special legislation will provide for the identification of the persons or entities competent to advance the request, and also in this case the existence of collective rights which are recognized alongside with individual rights should be covered by the necessary judicial protection.

6. The status of the cults in artt. 28-30 is not clear. Are they conceived as communities which have collective rights? Or are the rights provided for these entities conceived only as individual rights? Art. 30 apparently contradicts this second alternative entrusting the cults themselves with the power of establishing associations and foundations.

7. Section 5 of the Chapter II contains a detailed list of the minority rights in the field of the use of the mother tongue. Apparently the protection of the use of mother tongue may be implemented in two different ways both by placing in the public offices civil servants and agents who know the minority language or by appointing authorized translators and interpreters entrusted with the task of serving the needs of the relations between the public authorities and the persons belonging to the national minorities. The draft does not clarify when the two different solutions shall be adopted. Is the choice left to a decision of the public authorities concerned? Or does it depend on the percentage of the citizens belonging to the national minorities who are present in the territorial area assigned to the competence of the public authorities concerned? Or is it conditioned by the amount of the economic means of the authorities concerne?
The draft mentions at art. 37 the concept of a significant percentage but it does not give a clear idea of the relevant dimension of the concerned people.

8. The implementation of Chapter III requires the existence of a registration of the persons belonging to the national minorities. First of all it refers to the data of the census but it is not clear whether and how the personal declarations are made in the census and are kept in the archives by the competent offices. Moreover it is not clear whether there has to be a connection between the declarations made at the time of the census and the personal choices of the people concerned to become members of the organizations of the minorities which can be established according to Chapter III.

All the choices which have to be made in the matter should take into account the problem of the guarantee of the right to privacy of the people concerned. As far as the collection and the preservation of the census declarations are at stake, the personal identification of the authors of the declarations is not apparently necessary, but the identification of the people concerned is required for the preparation of the list of the members of the organizations in connection with the subscription of the forms of the adhesion to the organizations themselves according to the rules stated in art. 40.

Is the requirement of the submission of the list of the registered members (art. 41, 1 b)) compatible with the right of privacy of the interested people? Or do we have to think that the right of privacy is no more relevant when a person belonging to a national minotiy decides to become a member of a minority organization?

The draft shall be interpreted in any case according to the principle of art. 3.1 of the Framework convention for the protection of national minorities: persons belonging to national minorities may exercise the rights and enjoy the freedoms flowing from the principles enshrined in the draft-law without being disvantaged because of their choice to be treated or not to be treated as such. Art. 17 clearly explains that a person cannot be treated as a member of a national minority against his/her will. In this case he/she shall be covered by the right of privacy. Therefore, in principle the right of privacy shall be protected at least as far as the declarations made in view of the census are at stake because of their registration and their use according to art. 40, 2,3,4. We can guess that the right of privacy is no more relevant when a person publicy exercises his/her minority rights.

9. Chapter IV completes and integrates the constitutional system of the protection of the minorities adding to the constitutional provision for some parliamentary seats reserved to the minorities the institution of the Council of National Minorities. A consultative body of the government, the Council is composed from the organizations of the national minorities represented in Parliament. It does not only advise the authorities by expressing points of view on draft-laws in the matter, but also proposes measures and interventions aimed at improving the activity of protection.

Essential is its role in the distribution of budgetary funds destined to the financing of the activity of the organizations of the minorities: its decision in the matter is a proposal which has to be submitted to the Government for the final adoption. It is not clear whether the proposal of the CNM is mandatory for the Government or the Government is allowed to amend the proposal itself. If this last alternative is preferred, the government should justify its amendments in written form explaining the reasons why it does not follow the proposal.

But, in any case, the CNM is not the executive branch of the public administration in the field. The public institution with legal persanality entrusted with the administrative tasks in the matter is the Authority for Inter-Ethnic Relations which has to be established in the subordination to the Prime Minister. Its organization and functioning shall be regulated through governmental decisions, notwithstanding the fact that its independence is formally guaranteed. The draft-law does not provide for consultative interventions of the CNM in the elaboration of those decisions and in the choice and appointment of the staff assigned to the Authority (art. 55.6).

The Authority exercise its prerogative by issuing orders, dispositions, decisions, attestations and approvals. It has to maintain the connection with the CNM in order to fulfill its tasks but the draft-law does not explain the role of the CNM in the decision-making processes aimed at the adoption of all these acts (art. 55.7).

10. Chapter V dealing with the cultural autonomy of the national minorities implements the collective dimension of the protection. According to art. 57 cultural autonomy means 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. There are not international accepted models of cultural autonomy, international principles and standards are missing but the introduction of this peculiar arrangement of protection can be justified in view of the principle according to which a minority shall have a say in the matters which interest its protection.

The main fields of the cultural autonomy are: education in the mother tongue, cultural and educational institutions in the mother tongue, mass-media organs, preservation and valorization of historical monuments and cultural patrimony. Its main functions are: organization,

administration and control of the activity in the mentioned fields, directly or in partnership with public competent authorities; appointment of the management of the relevant private institutions or approval of the appointments of the management of public institutions working in the field; elaboration of the strategies and prioroties of the activities in the matter.

It is not clear which shall be the relations between the bodies of the cultural autonomy and the private organizations which should be free in choosing their organization and their managing staff, and it is not explained who will choose the legal forms of the relevant activities, according to the preference for the direct exercise of the functions by the communities of the national minorities or, instead, the partnership with the competent authorities. In this last case the conclusion of an agreement between the interested community and the relevant public authorities should be provided for.

A community exercises the cultural autonomy through the National Council of Cultural Autonomy or through its representative organization (art. 59). The establishing of the NCCA requires elections which shall be carried on by the initiative of the Authority for Inter-Ethnic Relations on request. Therefore a list of the members of the relevant organization is necessary. See art. 62.5 referring to art. 39.1 a and b. This is another case of evident derogation to the application of the right to privacy as far as the calling of the election and the exercise of the right of vote are implied. But also the functioning of the cultural autonomy should require that the list of the members of the community is openly known: for instance, art. 58 l privides for the establishment of special taxes, in compliance with the law, in order to ensure the functioning of the cultural autonomy.

Perhaps it could be advisable providing for a lear definition of the extension of the autonomy of NCCA with regard to the matters reserved to the state authorities in the field of the organization and activity of the NCCA itself(art. 61). The law has a general competence in the matter but it should also leave some space to the internal normative acts of the NCCA.

Art. 72 correctly establishes the competence of the administrative courts when legal disputes arise between the National Council of Cultural Autonomy and County Committees and the state authorities.

11. The draft-law does not say anything about the establishment of a National Council of Cultural Autonomy for a national minority which has more than one organization. The problem is relevant because the draft-law allows the existence of more than one organization for a minority: see art. 51.2

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The draft-law deserves a positive evaluation notwithstanding the fact that many ambiguities and faults are present in the text. In any case it should be redrafted to improve the connection between the initial two chapters and the following three chapters. For instance, it is not clear who are the representatives of minorities mentioned in artt. 11 and 17, and in other parts of the Chapters I and II.