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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

OBSERVATIONS
ON THE DRAFT LAW
ON THE STATUTE OF NATIONAL MINORITIES
OF THE REPUBLIC OF ROMANIA

by

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1. General Observations

The present comments are based on the English translation of the Draft Law, provided to the Venice Commission. It may well be that some of the comments find their cause in a misunderstanding of the text as translated.

The Draft Law submitted to the Venice Commission for its opinion is not accompanied by an explanatory memorandum. Such a memorandum would make it easier, at some instances, to understand the intention of the drafters. It is recommended that such an explanatory memorandum, if not yet available, will be prepared, also for the benefit for the future interpretation and application of the Law.

2. Comments on an article by article basis

Article 3 makes citizenship an element of the definition of “national minority”, at least for the purposes of the present Law. Although there is no clear international *communis opinio* yet on the definition of “national minority”, there is a clear trend not to make, 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, and access to certain public functions). It is recommended to follow this trend and not to make citizenship an element of the definition of “national minority”, but to provide for certain specific rights that their enjoyment is restricted to citizens.

Deleting this element of the definition would also take away certain apparent contradictions. 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, that 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. In addition, **Article 7** of the Draft Law, on the one hand, in paragraph 1 stipulates 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, while, on the other hand, paragraph 2 provides that the public authorities will take the necessary measures in order to protect the 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. These general provisions are difficult to be reconciled with each other, and the second paragraph of Article 7 is difficult to be reconciled with the provision of Article 5 that 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, if that acknowledgment and guarantee are restricted to citizens only.

The words “living on the territory of Romania from the moment the modern Romanian state was established” are not clear without further explanation, while they constitute one of the elements of the definition of “national minority”.

Article 4 of the Draft Law contains the important right of persons belonging to national minorities to express freely and unhindered their affiliation with a national minority. **Article 13** of the Draft Law makes it clear that this right implies the right not to declare such affiliation. This is in conformity with Article 3, paragraph 1, of the Framework Convention for the Protection of National Minorities (hereafter: Framework Convention). However, both provisions of the Draft Law 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. The exceptions to this right, if any, should be clearly defined and should serve a legitimate aim and be proportionate to that aim.

Article 8 of the Draft Law establishes responsibility for discrimination or instigation to discrimination based on affiliation to a national community “if the penal law is not applicable”. More or less the same provision, and the same restriction, are to be found in **Article 12** of the Draft Law. This indicates, or at least leaves open the possibility, that the said discrimination and instigation are not generally punishable under Romanian criminal law. This raises the question of whether Romania has fully and effectively implemented its obligation under Article 6, paragraph 2, of the Framework Convention “to take appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity”.

The second paragraph of Article 8 deals with the so-called “positive discrimination”. It is not clear why, in addition to public authorities, only legal persons of private law are mentioned and not also natural persons or individuals. The latter may also take measures of positive discrimination, for instance employers or landlords.

Article 9 of the Dr

aft Law, in the second paragraph, lists the “elements of identity” of communities of national minorities. It is not clear why “symbols” are not mentioned under these elements, while **Article 15** of the Draft Law expressly deals with the use of specific national symbols.

The third paragraph deals with the preservation, expression and promotion of these elements through educational and cultural institutions, mass-media and institutions of cult. It is not clear from the wording in the English translation whether this provision contains a right to do so or rather a duty, and in the latter case, how the fulfilment of such a duty will be facilitated and supervised, taking into account the independent nature of the institutions and mass-media concerned. Does the provision imply a positive obligation on the part of the public authorities?

Article 10 stipulates in the first paragraph that the State guarantees to persons belonging to a national minority the right to express freely their national identity in all the fields of political, social, scientific, cultural and economic life. It is not clear for all these areas what the scope of this right is, for instance in economic life. Moreover, it is not clear what the nature and scope of the guarantee is; will this freedom be guaranteed by laws and regulations, and/or by any other (affirmative) measures?

The third paragraph deals with the free expression in writing and through images, sounds or any other means of communication in public, while the fourth paragraph states that no normative document may restrict the use of a language in the exercise of the rights stipulated in paragraph 2 (read: 3?). From **Article 31** it becomes clear that this freedom to use the minority language in public does not unconditionally include the right to use it for public purposes, for instance in the court room or at the municipal offices. This should more clearly appear from the wording.

Article 11 contains from the competent authorities the obligation to take the will of the representatives of the minority concerned into account in matters regarding the rights of persons belonging to that minority. This provision seems to establish some form of representation in the public sphere, but needs further elaboration as to the appointment of the representatives, their functions and powers and the procedure of consultation.

Article 14 contains the right for persons belonging to national minorities to live freely on the territory of Romania. This provision would seem to make sense only, if it also includes non-citizens, since citizens of Romania have that right as citizens, irrespective of whether they belong to a national minority or not (see also Article 2 of Protocol No. 4 of the European Convention on Human Rights).

The fourth paragraph deals with contacts and liaisons of persons belonging to a national minority with persons of that same minority in other countries. It stipulates that the state ensures the conditions for the preservation of these contacts. It is not clear whether this implies only an obligation not to interfere with these contacts or also a positive obligation to facilitate those contacts. It is also not clear why contacts in the religious domain are not mentioned.

The provision should make reference to the obligation of the state to respect the sovereignty of the other states concerned, and the desirability to conclude agreements regulating these inter-state contacts. See Article 48, under f), of the Draft Law and Article 18 of the framework Convention. See also the Report of the Venice Commission of 22 October 2001 “on the Preferential Treatment of National Minorities by their Kin-State”, CDL-INF (2001).

The same holds good for the fifth paragraph dealing with transfrontier co-operation between local authorities from areas where the same language is used. It is clear that the Romanian law cannot regulate such co-operation unilaterally.

Article 15 of the Draft Law provides *inter alia* that national minorities may organize their own national and religious holidays. It needs further clarification what the implications of this right are, and especially whether, and to what extent, it may be exercised in public and private relations, for instance in labour relations.

Article 16 contains important provisions concerning the right of persons belonging to national minorities to be educated, and to provide education in their mother tongue. However, the first three paragraphs contain the restriction “in the conditions of the law” or “according to the law”. This means that the scope of these rights cannot be determined as long as the restrictions ensuing from (other) laws, are not known or not clear. It is submitted that a Law on the Statute of National Minorities should contain the core of the minority rights which may not be restricted by other laws.

The fourth paragraph stipulates the right to choose the language of education and the type of education. However, this right may be enjoyed effectively only if education in the language concerned and the type of education to be chosen are available. The same holds good for the fifth paragraph concerning the right to be taught in the mother language at pre-university level.

The previous paragraphs contain a right for organizations and associations of national minorities and religious cults to establish educational institutions which benefit from stipends from the state or local budgets, but this does not guarantee the availability of the education chosen by the person concerned.

Article 17 of the Draft Law purports to guarantee the availability of teaching in the mother tongue of national minorities. However, apart from the fact that the first paragraph contains the proviso “in the conditions of the law”, at several instances it says “upon request”. This raises the question of how many persons must request education in a certain language in order to create an obligation on the part of the state. The same question as to the required number of potential students arises under the sixth paragraph of **Article 18** of the draft Law. It seems to follow from

Article 19 of the draft Law that the required number of students may be lower than the number generally required by law.

The obligation of the State to guarantee the education in the language concerned has to be fulfilled taking into account the right of the minority associations to organize and ensure the functioning of such education under Article 16. In that respect, **Article 18** of the Draft Law provides for compulsory consultation of representatives of the national minority concerned and prior approval of the National Council of Cultural Autonomy of the respective national minorities. It depends on the representative character of the latter (see Chapters III and V of the Draft Law) whether and to what extent the right to receive and provide education in the minority language are effectively guaranteed.

The same issue of self-determination and autonomy arises under h) of Article 17 concerning the obligation of the State to guarantee the establishment of institutions for research of traditions, culture, language, history, life and social problems of national minorities.

Article 20 of the Draft Law states in the first paragraph that the State guarantees to the persons belonging to national minorities the protection and preservation of their cultural inheritance. Here, again, it is not specified whether this guarantee entails abstention from interference only, or implies also a positive obligation to take the necessary affirmative action.

The fourth paragraph deals with financial support by the central and local authorities “on the conditions of the law”, without any further specification as to the relevant legal provisions, and as to quantities and sources.

Article 22 of the Draft Law contains an obligation for the central and local administrations to preserve and promote, together with the representatives of the national minorities, their historical monuments and movable cultural patrimony. Again, it is not specified which measures will be taken and procedures followed, and what funds will be available.

Article 23 of the Draft Law raises the same issue with respect of the obligation of the State and local administrations to support, through organizations belonging to national authorities, various kinds of minority programmes and activities.

Article 24 of the Draft Law dealing with the maintenance and promotion by public and private institutions of relations with institutions and organizations in other States, and support by the State of the culture of national minorities abroad, should contain the proviso of respect of the sovereignty of those other States and of the conclusion of agreements on areas where that will be needed (see Article 48, under f), of the Draft Law; see also the comments concerning Article 14).

Article 25 of the Draft Law provides that the State grants financial support to the mass-media "on the conditions of the law". It is not specified whether the mass-media operated by the national minorities are meant, nor to what legal provisions reference is made, and what the conditions and the sources of the financial support will be.

Article 26 of the Draft Law stipulates in the first paragraph that public radio and TV stations will provide space for shows in the minority languages, but does not specify duration and frequency.

The third paragraph speaks of "minorities having a significant percentage" in relation to the right to have whole-day regional shows on public stations, without further specification of the percentage required.

Article 28 of the Draft Law states that the State will guarantee the institutional and functional autonomy of cults. It is not clear whether this guarantee only concerns abstention from interference or also implies a positive obligation to take affirmative action if needed.

Article 30 of the Draft Law provides for support by the State of associations, foundations and cultural-educational and social-charitable units established by cults, "on the conditions of the law". Here, again, it is not clear to what legal provisions reference is made and what the character and sources of the support will be.

Article 31 of the Draft Law provides for the use of the mother tongue for public purposes in those administrative-territorial units where the citizens belonging to a national minority have "a significant percentage". Leaving apart that it would not be logical to give this right to citizens only, and not also to other members of a national minority who are residents in the administrative-territorial unit concerned, the exact meaning of "significant percentage" is of such vital importance for the application of this article, that it should be specified.

The wording of Article 31 implies that in determining whether members of a certain national minority constitute a "significant percentage" of the population of the unit concerned, only citizens count, which has as a rather peculiar consequence that the mother tongue of a national minority may not be used in a unit where that minority forms a large majority of the population, if the members of that national minority who are citizens do not constitute a "significant percentage".

The same observation holds for **Article 37** of the Draft Law concerning the employment of staff who speak the mother language of the national minorities concerned in sanitary institutions, old people's homes, social assistance centres and placement centres; it would seem strange if members of the minority concerned who are residents but not citizens, are not taken into account in determining whether the requirement of "significant percentage" is fulfilled, while the exact meaning of "significant percentage" should be specified because of its importance for the application of this article.

Article 32 of the Draft Law concerning the issue of normative documents of general interest in the mother tongue contains the proviso "on the conditions of the law". It is not clear to what legal provisions the article refers.

Article 33 of the Draft Law concerning the use of the mother tongue in civil status documents, again, indicates that it would not seem logical to make citizenship a general condition for the enjoyment of minority rights. Indeed, for those persons belonging to a national minority who are residents in Romania but (still) do not have the special bond of nationality, registration of their name in the mother tongue would make even more sense. The same would seem to apply to

Article 35 of the Draft Law concerning the use of the mother tongue by detainees.

Article 34 of the Draft Law deals with the use of the minority language in court proceedings. Again, it does not seem logical to restrict this right to citizens. Moreover, the proviso "according to the law" requires further specification.

Article 39 of the Draft Law would seem to imply that organizations of national minorities, at least as far as regulated in the present Law, may consist of citizens only, since it speaks of "organizations of citizens". However, **Article 40** of the Draft Law, in its fourth paragraph, provides that persons who do not belong to a national minority may be members of an organization of citizens belonging to a national minority up to 25%. Indeed, it would be difficult to understand why these organizations, which will be established to promote and protect the identity of the national minority concerned, should not extend their activities to non-citizens resident in Romania who belong to the same minority, and why those non-citizens should not be members of these organizations. This point needs further clarification.

More specifically, the first paragraph under b), which also speaks of "organizations of citizens", would seem to imply that the minority organizations which take part in local elections, consist only of citizens, or at least that only citizens may participate in those elections. As the Venice Commission stated in its opinion of 4 December 2004 "on the Law for the Election of Local Public Administration Authorities in Romania, CDL-AD(2004)040, § 9: "a tendency is emerging to grant local political rights to long-standing foreign residents, in accordance with the Council of Europe Convention on the Participation of Foreigners in Public Life at Local Level [ETS 144]. Furthermore, the Venice Commission recommends, in its Code of Good Practice in Electoral Matters, that the right to vote in local elections be granted also to non-citizens, after a certain period of residence. Therefore, it is recommended to amend the Law to omit the restriction to citizens in Articles 2, 3 and 4. This would be a move towards a more direct involvement of stable resident non-citizens in the public affairs of the place in which they live and an enhancement of all-inclusive democracy. The Venice Commission sees no reason why Romania should not move also in this direction." The implications of the term "organization of citizens" for the right to participate in local elections should be clarified.

Article 40 of the Draft Law, in the second paragraph, 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 would be too restrictive a condition for organizations 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 scale. In view of the important competences of these organization (see Article 48 of the Draft Law), such conditions may result in excluding large parts of national minorities from representative and consultative bodies.

The same holds good for the requirement in the third paragraph: if 10% in the last census is equal to or surpasses 25.000 persons, the list of founding members of an organization must at least contain 25.000 persons, domiciled in at least 15 counties. This would exclude the founding of an organization at the local level in a unit where there is a concentration of persons belonging to a certain minority.

The fourth paragraph determines that not more than 25% of the members of a minority organization may be persons who do not belong to the minority concerned, while the fifth paragraph prohibits membership of two organizations belonging to the same minority. Both provisions amount to an interference in the freedom of association, guaranteed in Article 11 of the European Convention on Human Rights. They, therefore, need a justification under the second paragraph of that treaty provision.

Article 42 of the Draft Law in its first paragraph makes a distinction between "citizenship" and "nationality". The difference between the two notions for the purpose of the present Law should be clarified.

Articles 45-47 of the Draft Law amount to an interference with the freedom of association guaranteed in Article 11 of the European Convention on Human Rights. They, therefore, also need a justification under the second paragraph of that treaty provision.

Article 48 of the Draft Law provides under g) that the organizations of minorities referred to in Article 39, may represent persons or group of persons affiliated with the respective minority before national or international courts. The scope of the provision is not very clear. In principle it is up to the parties in judicial proceedings to choose their representatives, although the law may provide that they shall be represented by legal council. If the provision purports to establish a monopoly for minority organizations to represent the persons or groups of persons referred to, the situation may arise that a person or group of persons has to be represented by an organization while no organization exists that may be considered to be representative of the person or group concerned because of the conditions of Article 40.

Article 52 of the Draft Law, in its first paragraph, requires governmental approval of the regulations of the Council of National Minorities. This makes the Council a somewhat ambiguous body; partly a private legal entity (see Article 51, fourth paragraph) for the promotion and preservation of the cultural identity of the national minorities in Romania, partly a semi-public consultative body to the Government. In view of the character and functions of the Council it would seem more appropriate if governmental approval would be required only for those provisions of the regulations which deal with its consultative function.

Article 53, under b), provides another example that it seems not logical to restrict the application of the Law to citizens: why should the Council of National Minorities restrict its proposals to the social and cultural life of those members of national minorities who are citizens?

Article 55 of the Draft Law states in its first paragraph that the Authority for Inter-Ethnic Relations is subordinated to the Prime Minister, and in its second paragraph that the Authority carries out its activity independently. These at first sight contradictory provisions should be clarified.

In the fifth paragraph, under c), it is stated that the Authority monitors the application of internal and international normative documents referring to the protection of national minorities. It should be clarified whose application of these norms is monitored, according to what procedures and what follow-up is given to the outcome of the monitoring.

Article 73 of the Draft Law is not clear as to its meaning, probably due to its translation.

Article 74 of the Draft Law contains a limitative lists of national minorities in Romania for the purposes of the present Law. This listing is not in agreement with the open definition of Article 3 of the Draft Law. No group which claims to meet the definition of Article 3 should be excluded beforehand; its claim should be examined and decided upon in a prescribed procedure.

Articles 76 and 78 of the Draft Law should be combined to avoid any contradiction.

3. Concluding Observations

The Draft Law contains provisions which, in principle, constitute a satisfactory framework for protection of minority rights in Romania. However, it contains certain vital limitations, and several uncertainties as to meaning and scope.

The most important limitation is contained in the definition of "national minority" for the purposes of the Draft Law. That definition makes "citizenship" an element of belonging to a national minority, and consequently of entitlement of the rights listed in the Draft Law. It is recommended not to make citizenship a general requirement for the enjoyment of minority rights.

Another potentially far-reaching set of limitations are the numerous references to other Laws and legal regulations. As long as the reference does not mention the Law concerned, and it is not even clear whether the Law concerned has been enacted, the scope of the protection guaranteed by the present Draft Law is unclear. It is recommended to specify the references to other Laws and legal regulations.

A third set of limitations with potentially far-reaching consequences, concerns the requirements of a certain percentage of the total number of persons belonging to a national minority according to the last census. Since the percentage will be calculated on a national level, this could set an insurmountable barrier for local minority organizations and programmes. The same holds good for the high number required to establish minority organizations.

A fourth possible limitation is implied in the limitative list of national minorities contained in Article 74 of the Draft Law.

The Draft Law also contains several (other) uncertainties as to the meaning and scope of the minority right guaranteed and its protection. They have been indicated on an article by article basis. To the extent that the lack of clarity is not caused by the translation, it is recommended to provide the required specification or explication in the text of the Draft Law or in an declaratory memorandum.