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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION
ON THE ACT ON THE RIGHTS OF NATIONALITIES
OF HUNGARY

on the basis of comments by

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I. Introduction

1. By a letter dated 1 February 2012, the President of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe asked the Venice Commission to provide an opinion on the Act on the Rights of Nationality of Hungary (CDL-REF(2012)014, hereinafter “the Nationalities Act”).
2. Mr Sergio Bartole, Mr Latif Huseynov and Mr Jan Velaers were appointed as rapporteurs. They travelled to Budapest on 15 and 16 May 2012 and met with representatives of the relevant Hungarian authorities, with the Deputy-Ombudsman for nationalities, as well as with representatives of Hungary’s nationalities and of the civil society.
3. The present opinion is based on an official English translation of the Nationalities Act, as provided by the Hungarian authorities. The translation may not always accurately reflect the original version on all points and, consequently, certain comments can be due to problems of translation. Further, the law under consideration is a cardinal law, which makes references to and is to be complemented by numerous other Hungarian sectoral laws. The Venice Commission has not examined these other pieces of legislation of relevance for the protection of national minorities in Hungary, which are therefore not in the scope of this opinion.
4. *The present draft opinion was adopted by the Venice Commission at its ... Plenary Session (Venice, ... June 2012*

II. Background

5. Hungary is a multilingual state. The large majority of the inhabitants are Hungarians. Nevertheless, according to the results of 2001 census¹, 4,34 % of the country’s population of 10.198.315, that is 442.739 expressed their affiliation with a national or ethnic minority (1). 1,33 % of the population, 135.788 persons selected a minority language as their mother (2) tongue, and 15 % of the population declared that they spoke a minority language (3), as follows²:

Minority and language data of the 2001 census

Gypsy/Roma 1) 205,720 2) 48,685 3) 217,235
Croatian 1) 25,730 2) 14,345 3) 47,122
German 1) 120,344 2) 33,792 3) 1,068,667
Romanian 1) 14,781 2) 8,482 3) 96,356
Serbian 1) 7,350 2) 3,388 3) 27,061
Slovak 1) 39,266 2) 11,817 3) 71,865
Slovene 1) 4,832 2) 3,187 3) 6,522
Bulgarian 1) 2,316 2) 1,299 3) 4,018
Greek 1) 6,619 1) 1,921 3) 9,034
Polish 1) 5,144 2) 2,580 3) 12,402
Armenian 1) 1,165 2) 294 3) 1,258
Ruthenian 1) 2,079 2) 1,113 3) 2,733
Ukrainian 1) 7,393 2) 4,885 3) 15,214
Total: 1) 442,739 2) 135,788 3) 1,579,487

6. The Act CLXXIX of 2011 on the Rights of Nationalities was adopted by the Hungarian Parliament on 19 December 2011, as part of the process of implementation of the new Constitution (The Fundamental Law) of Hungary, and entered into force on 1 January 2012. As required by the new Hungarian Constitution³, it has the status of a so-called “cardinal law”, “the

¹ The most recent population census was held in October 2011. Its results are not yet available.

² Source: Hungarian Central Statistical Office.

³ “The detailed rules for the rights of nationalities living in Hungary and the rules for the elections of their local and national self-governments shall be defined by a cardinal Act” (article xxix(3)).

adoption and amendment of which requires a two-thirds majority of the votes of Members of Parliament present”(new Hungarian Constitution, article T (4)).

7. Act CLXXIX of 2011 replaces the Act on National and Ethnic Minorities of 1993, which was already at the time of its adoption regarded as an “ambitious law making it possible for the thirteen recognized national minorities to participate in decision-making processes”⁴, and was guaranteeing both individual and collective minority rights to Bulgarians, Greeks, Croatians, Poles, Germans, Armenians, the Roma, Romanians, Carpatho-Rusyns, Serbs, Slovaks, Slovenes and Ukrainians.

8. In recent years the Act of 1993 was amended several times, taking into account *inter alia* some of the recommendations made by the Advisory Committee on the Framework Convention on National Minorities (hereinafter “the Framework Convention” and “the Advisory Committee”) and the Committee of Experts of the European Charter for Regional or Minority Languages (hereinafter “the Language Charter” and “the Committee of Experts”). According to the authorities, the Nationalities Act aims at further clarifying and extending the individual and collective rights of the national minorities and at eliminating some of the dysfunctions of the minority self-government elections.

9. In this context, it should also be noted that the Advisory Committee, in its Third Opinion on Hungary adopted on 18 March 2010, encouraged the Hungarian authorities “*to establish a new general legal framework covering all aspects of minority self-government in a single law to promote the effective participation of persons belonging to national minorities in cultural, social, and economic life, and in public affairs*”⁵.

10. The Venice Commission has been informed by the authorities that, prior to the adoption of the Nationalities Act, consultations have been organised with the various stakeholders involved. It results however from non-governmental sources that, in some cases, too limited time has been provided for comments and too little attention paid to the proposals submitted by the minority representatives and other interested actors. The Commission recommends that such consultations be more extensive and more effective in the future, including in the context of the implementation of the new Act.

III. International standards for the protection of national minorities

11. Hungary has ratified international treaties on the protection of human rights, which prohibit discrimination on the ground of language and which protect minority rights (notably the International Covenant on Civil and Political Rights (article 27), the Framework Convention and the Language Charter). According to the Hungarian Constitution (article Q.2), “*Hungary shall ensure harmony between international law and Hungarian law in order to fulfil its obligations under international law*”.

12. Fulfilment by Hungary of its international obligations to protect the rights of national minorities is monitored by the specific supervisory bodies of the Council of Europe - the Advisory Committee, the Committee of Experts, the European Commission against Racism and Intolerance (ECRI) and the Council of Europe Commissioner for Human Rights - and has led to the adoption of recommendations by the Committee of Ministers of the Council of Europe⁶.

⁴ See Advisory Committee on the Framework Convention for the protection of National Minorities, Third Opinion on Hungary adopted on 18 March 2010, ACFC/OP/III(2010)001

⁵ Idem, § 144

⁶ See Resolution CM/ResCMN(2011)13 on the implementation of the Framework Convention for the protection of National Minorities by Hungary (Adopted by the Committee of Ministers on 6 July 2011 at the 1118th meeting of the Ministers' Deputies).

IV. Constitutional framework

13. The Hungarian Fundamental Law deals in several places with the national minorities of Hungary. In the Preamble (*National Avowal*), beginning with the words “we the members of the Hungarian Nation”⁷, the national minorities are explicitly mentioned: “*The nationalities living with us form part of the Hungarian Political community and are constituent parts of the State. We commit to promoting and safeguarding our heritage, our unique language, Hungarian culture, the languages and cultures of nationalities living in Hungary, along with all man-made and natural assets of the Carpathian Basin.*”

14. Article H of the Fundamental Law furthermore states:

“1. *In Hungary the official language shall be Hungarian.*

2. *Hungary shall protect the Hungarian language.*

3. *Hungary shall protect Hungarian Sign Language as a part of Hungarian Culture*”.

15. According to Article XV(2), which contains a general anti-discrimination clause, “*Hungary shall ensure fundamental rights to every person without any discrimination on the grounds of race, colour, gender, disability, language, religion, political or other views, national or social origin, financial, birth or other circumstances whatsoever.*”

16. Article XXIX deals explicitly with the national minorities, stating:

“(1) *Nationalities living in Hungary shall be constituent parts of the State. Every Hungarian citizen belonging to any nationality shall have the right to freely express and preserve his or her identity. Nationalities living in Hungary shall have the right to use their native languages and to the individual and collective use of names in their own languages, to promote their own cultures, and to be educated in their native languages.*

(2) *Nationalities living in Hungary shall have the right to establish local and national self-governments.*

(3) *The detailed rules for the rights of nationalities living in Hungary and the rules for the elections of their local and national self-governments shall be defined by a cardinal Act.*”

17. Also, pursuant to Article 2(2), the participation in the work of Parliament of nationalities living in Hungary shall be regulated by a cardinal Act,

18. Finally according to Article 30(3), Parliament shall elect the Commissioner for Fundamental Rights and his or her deputies for six years with the votes of two-thirds of all Members of Parliament. The deputies shall ensure the protection of the interests of future generations and of the rights of nationalities living in Hungary.

19. In its 2011 Opinion on the new Constitution of Hungary, the Venice Commission examined the provisions relating to national minorities and their protection. On the one hand, the Venice Commission noted the non-inclusive language of the Preamble, opposing “We, the members of the Hungarian Nation” to “the nationalities living with us” (§ 40) and the lack of an explicit guarantee for the protection of languages of national minorities (§45), as well as the commitment, in its basic provisions to “respect” the right of citizens belonging to national minorities, but not explicitly to “protect” and “promote” these rights (§82).

20. On the other hand, the Venice Commission acknowledged that the Preamble mentions that the nationalities “*form part of the political community and are constituent parts of the state*” (§40), that article XXIX guarantees the right to the use of the languages of national minorities by Hungary’s nationalities (§45) and that a broad commitment of the State for the protection of nationalities was included in the preamble (§82). The Venice Commission stressed that it would depend on the interpretation and implementation of the constitutional provisions whether the

⁷ See the critique related to this opening phrase in Opinion on the new Constitution of Hungary, adopted by the Venice Commission at its 87th Plenary Session (Venice 17-18 June 2011) CDL-AD(2011)016, § 40.

Hungarian authorities would succeed in a comprehensive approach of minority rights, without diminishing the level of protection previously guaranteed in Hungary.

V. Analysis of the Act

A. General Remarks

21. The Venice Commission welcomes the efforts made by the Hungarian authorities to provide a comprehensive legal framework for the protection of national minorities. Indeed, the Nationalities Act can be considered as an important piece of legislation that guarantees internationally recognised rights of persons belonging to national minorities, enabling them to freely express, preserve and develop, both individually and collectively, their ethnic, cultural and linguistic identity.

22. The Act provides for a wide range of individual minority rights (Chapter III). Collective minority rights are laid down in Chapter IV⁸. The exercise of these rights is based on the concept of nationality cultural autonomy, which is defined as “*a collective nationality right that is embodied in the independence of the totality of the institutions and nationality self-organisations under this Act through the operation thereof by nationality communities by way of self-governance*” (Article 2(3)).

23. Although provisions on the protection of minorities may be found in several other Acts⁹, the Nationalities Act is surely the most important Act for the protection of the rights of persons belonging to national minorities. As mentioned above (§ 6), this Act is a cardinal law containing “*the detailed rules for the rights of nationalities living in Hungary and the rules for the elections of their local and national self-governments*”.

24. The Venice Commission is of the opinion that there are good reasons to guarantee the rights of minorities in the Constitution itself and/or in a cardinal law, as these rights ought to be protected on a stable and secure basis and should not depend on the will of a majority in the existing parliament at a given time.

25. Nevertheless, the Venice Commission notes that Article 158 of the Act contains a list of provisions of the Act which qualify as “cardinal” (articles 1-157, 159-180, 181-183 and 193), on the basis of either article XXIX (3) or article 31(3) of the Constitution. In other words, all provisions of the law are qualified as cardinal with the exception of article 158 itself and the provisions aimed at amending old provisions of relevance for minority protection. This implies that the amendment of these articles require a two-thirds majority. As Article 158 of the Act itself is not qualified as “cardinal”, the question arises of whether a simple majority will suffice to amend it and to disqualify the other articles of the Act. The question arises in this respect of whether there is a too widespread recourse to cardinal provisions, with the ensuing risk for possible future reforms to be stuck in long-lasting political conflicts and undue pressure and costs for society¹⁰.

26. The Venice Commission further notes with concern that the overwhelming majority of the transitional provisions contained in Chapter XII are not transitional in nature: while the main rights and freedoms of the minorities are dealt with, in very general terms, by the opening provisions, the transitional provisions also contain substantial rules relating, in particular, to educational and cultural rights of nationalities, to the status and remuneration of members of nationality self-governments of different levels, etc. Furthermore, it is not clear why a great deal of these provisions simply repeat - or maybe further explain - what is laid down in the respective

⁸ Some of these rights, in particular, education rights of national minorities, can also be found in the Transitional provisions (see below Para. 16).

⁹ See European Charter for Regional and Minority Languages, *Fifth periodical report presented to the Secretary General of the Council of Europe*, in accordance with Article 15 of the Charter, MIN-LANG/PR (2012)4, p. 24-37..

¹⁰ *Opinion on the new Constitution of Hungary*, adopted by the Venice Commission at its 87th Plenary Session (Venice 17-18 June 2011) CDL-AD(2011)016, § 24.

Articles of Chapters V and VI (cf. for example, Articles 23(1) and 162(1); 23(2) and 162(3); 23(3) and 163(1); 28 and 165(1); 29 and 165(2); 30 and 165(3); 104(1) and 169(1); 109(1) and 173(1)). That said, one can also find in this Chapter several “new” substantial provisions¹¹. The provisions dealing with organizational matters are also of particular importance since the creation and the operation of nationalities’ institutions is in Hungary crucial for the implementation of the minority protection measures and the enjoyment of the guaranteed rights.

27. The Venice Commission is also of the view that the Nationalities Act - especially as a cardinal law which requires a special majority to be amended - contains too specific and detailed provisions, of a merely technical and procedural nature¹², which could have been set out by the ordinary legislation or by these bodies’ internal regulations. Such a detailed regulation reduces the possibility of adapting the law in the light of the experience in its application and may lead to undue restriction of the free exercise by the minorities of their rights, as well as negatively affect the autonomy of nationality self-governments (see section c) below). In addition, despite their very detailed nature, important provisions of the law lack clarity and their inter-relation is sometimes difficult to understand.

28. The status of the Act within the Hungarian legal system and its inter-relations with other Hungarian laws, to which numerous references are made, should have been made clear by the Act itself. In addition, different dates are set up for the entry into force of different provisions of the Act¹³. This adds to its length and complexity and may make its interpretation and application difficult.

29. Finally, it should be noted the several provisions of the Act have been challenged before the Constitutional Court by the New Commissioner for Fundamental Rights¹⁴.

B. Specific Remarks

a) Terminology. Definitions

30. In accordance with the Fundamental Law, the Nationalities Act introduces the concept of “nationalities”, which is used instead of “national and ethnic minorities”. It should be recalled that the 1993 Act was titled as “Act on the Rights of National and Ethnic Minorities”.

31. Neither the text of Framework Convention nor its Explanatory report contain a definition of the concept of “national minority”. The States Parties to this convention therefore have a margin of appreciation in this respect “in order to take into due account the specific circumstances prevailing in their countries. On the other hand, this margin of appreciation must be exercised in accordance with general principles of international law and the fundamental principles set out in

¹¹ For example, Article 163(5) stipulates that “Degrees or college diplomas obtained in the mother land by individuals belonging to nationalities and further certificates verifying the acquisition of qualifications or vocational qualifications shall be equivalent to the corresponding degrees and certificates obtained in Hungary as set forth in the relevant international agreement or legal rule”.

¹² See e.g. the very detailed rules on the elections and by-elections of the local self-governments (articles 50-70) or the rules on the cooperation of Nationality self-governments with State and Local Municipality Agencies. (articles 79-86) on the operation of Nationality self-governments (articles 87-98) and on the conflict of interests in the case of the Officials and Members of Nationality self-governments (articles 106), the forfeiture of honours (articles 107-108), the remuneration (articles 109-112) etc.

¹³ According to Article 157 of the Law, while most of its provisions will enter into force on the day following its promulgation, 5 further dates are indicated for the entry into force of a number of specific provisions (1 January 2012, 31 March 2012, 1 September 2012, 1 January 2013, 1 September 2013, and the date of the calling of the 2014 elections for nationalities’ self-governments).

¹⁴ The petition concerns: Article 2 (14) - on the definition of nationality organisations as non-profit associations, the only ones entitled to propose candidates in elections; article 56 (1) - the use of the 2011 census results as a basis for organising nationalities’ self-government; article 107 (1.b) and (2) - forfeiture of honours requirement in relation to members of nationality self-governments; article 142 - the issue of collective responsibility for unlawful utilisation of nationality self-government assets; article 167 - the assets of the terminated local nationality self-government and their transfer to the ownership of the county or the national municipality; article 95 (1) and (3) - the obligation to use Hungarian alongside the nationality language for the meeting reports of the nationality self-governance and article 101 (3) - the funding by nationality self-governments of the use of sign language or any other special communication system at the board meetings.

art. 3 FCNM¹⁵. The margin of appreciation is not unlimited, so that the implementation of the Framework Convention is not a source of arbitrary or unjustified distinctions.

32. The Nationalities Act defines nationalities as ethnic groups that fulfil certain objective features (namely, language, culture and traditions) and a subjective element (the desire to preserve these features). This definition is very similar to that contained in the 1993 Act. Thus, according to the current Act, *“all ethnic groups resident in Hungary for at least one century are nationalities which are in numerical minority amongst the population of the State, are distinguished from the rest of the population by their own language, culture and traditions and manifest a sense of cohesion that is aimed at the preservation of these and at the expression and protection of the interests of their historically established communities”* (Article 1§(1). In addition, an individual belonging to a nationality is defined as a person *“who resides in Hungary, regards himself as part of a nationality and declares his affiliation with that nationality in the cases and manner determined in this Act”* (article 1 (2)).

33. The condition of a residency of “at least one century” is a rather restrictive condition¹⁶, as it includes only autochthonous or “historical” minorities and excludes “new minorities”. In a number of declarations made by State Parties to the Framework Convention, the requirement of having traditional, firm, long-standing and lasting ties with the territory of the state is present¹⁷; however, in order to define this condition the criterion of three generations has been found to be more suitable¹⁸ than the very restrictive criterion of 100 years, which is used in the national legislation of some states¹⁹.

34. The Commission further notes that the protection of the minorities is strictly connected to the territory and implies relations with the national and local levels of government which are specifically regulated by the Act. This may raise difficulties in the interpretation of the definition, as well as in the implementation of the Act. This could be the case in respect of some minority groups, such as the Roma, which is made up by many groups having different territorial origins and a long history of collective movements in all Central - Eastern Europe. The combined reading of the time and territory conditions may also raise some problems.²⁰

35. Although the above-quoted definition (unlike the one contained in the 1993 Act) does not contain a reference to the “citizenship” criterion, it clearly follows from the Hungarian Constitution (Article XXIX) as well as from the present Act²¹, that minority rights in Hungary are restricted only to citizens.

¹⁵ R. Hofmann, « The Framework Convention for the protection of National Minorities : an introduction », in M. Weiler (ed), *The Rights of minorities. A commentary on the European Convention of National Minorities*, Oxford University Press, 2004, p. 16.

¹⁶ The Venice Commission has already expressed doubts as to this criterion, in the context of the assessment of the 1993 Act. See CDL-MIN(1993)004rev, Opinion on the Hungarian Bill N°5190 on the Rights of National and Ethnic Minorities, § 4.

¹⁷ E.g. Austria: “groups which live and traditionally have lived”; Estonia: “maintaining longstanding, firm and lasting ties with Estonia”; Germany: “or the ethnic groups traditionally resident in Germany”; Latvia “who have traditionally lived in Latvia for generations”; Luxemburg: “a group of people settled for numerous generations on its territory”; Switzerland: “long-standing, firm and lasting ties with Switzerland”

¹⁸ See G. Brunner and H. Küpper, *Minderheitenschutz im östlichen Europa, Ungarn*, 2004 and A. Verstichel, “Personal scope of Application: an open inclusive and dynamic approach”, in A. Verstichel, e.a. (eds), *Antwerp-Oxford, Intersentia*, 2008, p. 148 referring to a statement of the Hungarian Commissioner for National and Ethnic Minorities, Jenö Kaltenbach, that the time criterion should have been put on three generations.

¹⁹ Polish Law on National and Ethnic Minorities of 2005 and also already the Hungarian Minority Rights Act of 1993.

²⁰ The joint interpretation of the two conditions, in conjunction with the statements contained in the Preamble of the new Constitution of Hungary, may raise problems from the perspective of inter-State relations (see CDL-AD(2011)016, Opinion on the new Constitution of Hungary, § 39)

²¹ Article 170(1) of the Act explicitly provides that “[t]he effect of this Act shall extend to Hungarian citizens residing in Hungary and belonging to a nationality as well as to the communities of these individuals”.

36. While such an approach is not uncommon in European countries, the Venice Commission has made it clear that the restriction of the notion of minority to citizens only “departs... from recent tendencies of minority protection in international law... Furthermore, except in the case of political representation at levels other than the local level, citizenship is generally irrelevant to the content of internationally prescribed minority rights”²². Moreover, the Commission has concluded in its Report on non-citizens and minority rights²³ that “[c]itizenship should therefore not be regarded as an element of the definition of the term “minority”, but it is more appropriate for the States to regard it as a condition of access to certain minority rights” and found appropriate to “encourage those States which have adopted constitutional provisions and/or entered a formal declaration under the FCNM restricting the scope of protection for minorities to their citizens only, to consider, where necessary, the possibility of extending on an article-by-article basis, the scope of protection of the rights and facilities concerned to non-citizens”

37. State Parties to the Framework Convention have also been encouraged by the monitoring body of this Convention, the Advisory Committee, to consider the inclusion of persons belonging to other groups, including non-citizens as appropriate, in the application of the Convention on an article-by-article (sectoral) basis.

38. In addition to establishing the “citizenship” criterion, the Act also lists (in its Appendix) thirteen ethnic groups which qualify as “nationalities”: Bulgarian, Greek, Croatian, Polish, German, Armenian, Roma, Romanian, Ruthenian, Serbian, Slovak, Slovene and Ukrainian. As it is formulated, this appears to be a closed list. Consequently, persons belonging to other groups are not included in the personal scope of the present Act. However, the Act stipulates that, if such groups successfully make use of the popular initiative procedure foreseen in Article 148(3), they may become beneficiaries of minority rights. For that, the signatures of at least one thousand electors forming part of such an ethnic group must be collected and submitted to the National Election Committee which “shall seek the position of the President of the Hungarian Academy of Sciences with respect to the existence of the statutory conditions” (Article 148(5)).

39. The Commission welcomes the decision of the Hungarian legislator to leave open possibilities for future developments, namely for a widening of the personal scope of application of the minority protection to groups other than the 13 recognised nationalities.

b) Data collection and the right to the individual free self-identification

40. Article 11(2) stipulates that no one may be obliged to make a declaration on the issue of affiliation with a certain minority, although the exercise by a person of a given minority right may be conditional upon making such a declaration²⁴. This is in line with the provisions of article 3 of the Framework Convention, stating: “Every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice”. It is also positive that the Act recognises the possibility of double or multiple affiliations. The Act moreover provides for the following important safeguard - and this is another positive element - that minority data collection should be based on a system of voluntary self-identification and anonymity (confidentiality) (Article 13(1)). The Venice Commission welcomes this clear emphasis laid on the individual right to declare (or not) one’s membership of a nationality.

²² See CDL(2001)74, Opinion on the Constitutional Law on the Rights of National Minorities in Croatia, ad § 4; CDL(2001)71 rev., Opinion on the Draft Law on Rights of National Minorities of Bosnia and Herzegovina, ad § 4.

²³ CDL-AD(2007)001, §144, Adopted by the Venice Commission at its 69th plenary session (Venice, 15-16 December 2006)

²⁴ The results of the census collection of data shall be used *inter alia* in view of the use of the mother tongues of the national minorities: for the minutes and decisions of the boards of the representatives of local municipalities (art. 5 (4) (5); in the promulgation and publication of decrees and announcements, in the forms, in the display of names and inscriptions (also of locality and street names) of local municipalities (art 6 (1)); as a criterion in filling the positions of local civil servants and public sector employees, and the position of notary public and court bailiff (art. 6 (2)); in providing for the media service operated or financed by the local municipalities (art. 6 (3)).

41. In addition to welcoming the guarantees provided by the Act with regard to these important principles, the Commission wishes to stress the importance of having reliable data on the ethnic make-up of the population. It positively notes that, as indicated by the Hungarian authorities, particular attention has been paid, in preparing the 2011 census, to establishing the census questions and forms in such a way as to allow the free expression of individuals' ethnic, linguistic or religious identification. In particular, the census questions relating to nationality/ethnicity, language and religion were optional and open-ended²⁵ and could be answered anonymously. In addition, the questionnaire included the possibility to declare double or multiple identity affiliations.

42. It is also commendable that minorities' representatives have been consulted on the wording of the questions and that the census forms have also been made available in the languages of the 13 recognized minorities. Likewise, the principles contained in Recommendation No. 97 (18) of the Committee of Ministers concerning the protection of personal data collected and processed for statistical purposes should be duly taken into account in the context of the processing and use of the data collected.

43. The Venice Commission notes nevertheless that the use of the census results as a basis for the implementation of minority protection measures, as stipulated by the new Nationalities Act, has raised concern and debate in Hungary, notably because the census was held prior to the adoption of the new Act and that the members of Hungary's nationalities were - as indicated by their representatives - not adequately informed of the impact of the data collected through the population census on the minority protection policies.

44. In this respect, the Venice Commission, without expressing doubts on the correctness of the 2011 census, wishes to recall that awareness-raising activities among nationality communities, well in advance of the population census and in co-operation with nationality representatives, are instrumental for the proper understanding of the census' aims and usefulness and of the importance of collecting data on the ethnic composition of the population. These are also an excellent opportunity to inform the population about the national safeguards and international standards for the protection of personal data.

45. In addition, the authorities should consider, in order to complement the census results, other possibilities - such as sociological and other studies and surveys - for obtaining data on the numerical size of the nationality communities and their relative situation. This should also enable, in designing and implementing minority protection policies, a more flexible reference to the actual number of the concerned persons in between censuses (held every ten years).

c) Nationality self-governments

46. The Venice Commission welcomes the maintenance and the strengthening of the minority self-government system at the local, regional and national level²⁶. The expression of nationality self-governments is used with regard to boards which are elected by the electors recorded in the nationality register and have a changing number of members according to the number of the registered electors. This system, which was already present in the 1993 Act and which was amended in 2005, makes the minority self-governments the strategic partners of the central and local authorities in the resolution of specific minority policy issues: they are vested with the right of consultation and agreement on the most important issues concerning the life of the community (education, culture and use of language) and they enjoy functional and financial

²⁵ See in this respect : [//www.unece.org/stats/publications/CES_2010_Census_Recommendations_English.pdf](http://www.unece.org/stats/publications/CES_2010_Census_Recommendations_English.pdf) § 425

²⁶ "Nationality self-government" is defined as "an organisation established on the basis of this Act by way of democratic elections that operates as a legal entity, in the form of a body, fulfils nationality public service duties as defined by law and is established for the enforcement of the rights of nationality communities, the protection and representation of the interests of nationalities and the independent administration of the nationality public affairs falling into its scope of responsibilities and competence at a local, regional or national level" (article 2 (2))

autonomy as regards the establishment, running and managing of educational and cultural institutions.²⁷

47. The 2011 Nationalities Act contains a number of provisions which aim, in the light of the shortcomings noted in the past, to strengthen the fairness of the minority self-government elections and to enhance the legitimacy of minority self-governments²⁸. Local self-government elections can only be held in settlements where a nationality has a genuine presence. As it results from article 56 of the Act, if the number of individuals forming part of a given nationality in a locality, according to the census data, does not reach thirty or if at the regional level the number of the called local elections does not reach ten, a local nationality self-government or a regional nationality self-government shall not be elected. In these cases a nationality self-government with nation-wide competence shall be elected. The elections shall be based on the census data (see comments above).

48. To exercise active electoral rights, the citizens must have the right to vote at the local elections, form part of the nationality and declare their affiliation with the nationality (article 53 (1)). A continuously administered electoral roll will be introduced as a new element. The conditions to exercise the passive electoral rights are strengthened: only an elector recorded in the nationality register who is eligible at the local elections and who has not been a candidate of another nationality in general or by-elections, who speaks the language of the nationality and is familiar with its culture and traditions can be a candidate in local council nationality election (article 54). The Act, however, does not specify, who and how shall verify whether or not this last requirement is fulfilled.

49. According to articles 58 to 61, “nationality organisations” are entitled to nominate candidates for the election of the members of nationality self-governments of different levels. Nationality organisation is defined in the Act as “a non-profit association whose purpose... is to represent a specific nationality...” (Article 2(14)). In this respect, two points might be raised. First, it is not entirely clear whether a nationality organisation may also include non-citizens living in Hungary who belong to a given minority. Second, restricting nationality organisations that are endowed with rights in the field of elections only to non-profit associations might appear to be questionable. In any case, since it affects the participation of the nationality members in the election of the nationality self-governments, the distinction between “nationality organisations” and “national associations” as defined in Article 2(15) should be clarified.

50. A great deal of the provisions of the present Act are devoted to the election, organization, operation and supervision of the nationality self-governments²⁹, and the rules governing the operation of nationality self-governments and of their internal structures appear to be excessively detailed. This is the case *inter alia* for the filling of vacant mandates, for the by-elections, the transformation of nationality self-governments and their coming into being and cessation, the convening of the meetings, their publicity, the required quorum and majorities for the adoption of decisions and even the contents of the minutes. In the Commission’s view, many of these organisational and/or procedural rules might be set out in the relevant internal regulations. More generally, the Commission is concerned that such a detailed regulation may negatively affect the autonomy of nationality self-governments and lead to undue restriction of

²⁷ See Advisory Committee on the framework Convention for the protection of National Minorities, Third Opinion on Hungary adopted on 18 March 2010, ACFC/OP/III(2010)001 and European Charter for Regional and Minority Languages, Fifth periodical report presented to the Secretary General of the Council of Europe, in accordance with Article 15 of the Charter, MIN-LANG/PR (2012)4.

²⁸ The elections will be held on the same day as local government elections.

²⁹ This includes: their members, nationality register, constituencies, calling of elections, nomination, voting, returning of election results, filling of vacant mandates, incompatibilities, by-elections, transformed nationality self-government, mandate of the nationality self-government and the board, status and rights and obligations of nationality self-governments, their cooperation with State and local agencies and operation, financial disclosure statement, committees of the nationality self-government, their chairs, conflicts of interests, forfeiture of honours, remuneration, responsibilities and competence of the nationality self-governments, the financial foundations of the fulfilment of nationality public duties and the monitoring of the operations, legal succession and settlement in the event of cessation, the associations of nationality self-governments, the supervision of the nationality self-governments and their relationship with central State agencies.

the free exercise by the persons belonging to nationalities of their rights. It is true that the nationality self-governments are legal entities, that they must exercise their rights “in the manner determined by law” (article 76) and that minorities’ self-elected bodies should not act in isolation from the wider society but be active part of it. Nevertheless, since they “may proceed independently” (article 78 (2)), a sufficient degree of flexibility should be guaranteed to them in order to avoid undue interferences by the public authorities.

51. The Commission also notes that the list of the local nationality self-governments’ responsibilities mainly contains (articles 113-122), instead of substantive minority protection competences, formal acts to be adopted by these bodies in order to enable the operation of the national communities’ cultural autonomy. This autonomy also seems to be framed by a particularly detailed regulation (articles 79 to 86) of the cooperation agreement that these bodies must conclude with the local municipality³⁰.

52. Article 150 (c) of the Act empowers the Government to supervise nationality self-governments for statutory compliance and this supervision is carried out by the metropolitan and county government offices. Although the Act limits the boundaries of such administrative supervision to the question of the legality of action (inaction) of nationality self-governments (article 147), the exercise of the said supervisory powers by the executive might raise concerns: first, given the very detailed regulation of the operation and functioning of nationality self-governments referred to above, it would be rather difficult for the latter to ensure full compliance with the law and thus to avoid undue and excessive interference by the executive; and second, the Act does not specify how this supervision shall be exercised. The Venice Commission understands that the State’s supervision of the activities of the nationality self-governments has to be exercised according to the rules of supervision of local self-government authorities, based on the principle of legality. It however considers that increased clarity is needed in this respect. In particular, the Venice Commission considers it important, in the light of the possible effects of the State’s supervision (up to the dissolution of the nationality self-governments), that a differentiation be made of the legal relevance of the irregularities noted in these bodies’ activities according to their gravity.

53. The mechanism provided for the dissolution of a nationality self-government body by the Parliament (article 148, article 150(d), article 151(1)), may also raise concerns. These provisions derive from the new Constitution of Hungary (Article 35(5)), which allow for Parliament’s dissolution of local representative bodies on the ground of a violation of the Constitution. In its opinion on the new Constitution of Hungary, the Venice Commission expressed concern with regard to the above-mentioned provision and emphasised that “[s]uch an important decision seems not to require a binding court decision and the role of the Constitutional Court in this context appears to be only of an advisory nature”³¹.

d) Education

54. The Venice Commission cannot but welcome the confirmation and the further development of rights related to education in the Nationalities Act. Article 12(1.c) specifically guarantees the individual right to equal opportunities in education and requires the State to take effective measure to promote it.

55. As stated by article 12 (b) and (c), the nationalities collectively have the right to education at all levels from kindergarten to higher education as well as (article 19) to initiate supplementary nationality education for their members. The State explicitly supports the use of the nationalities’ languages in the nationality public education. Moreover the extra costs of nationality public education shall be covered by the State (“in the manner determined in legal rules”). At the same time, Chapter V of the Act clearly speaks of and regulates in detail the “educational self-governance of nationalities”.

³⁰ The agreement may affect issues concerning the collective use of language, the nationalities’ education, the preservation of their traditions and culture, local press, the equal opportunities, social inclusion and social services (art. 81).

³¹ CDL-AD(2011)016, Opinion on the new Constitution of Hungary, § 19..

56. Children take part in “*education in their mother tongue, nationality bilingual education, nationality language education or Roma nationality education*” depending on the decision of their parents. A request by a minimum of eight children forming part of the same nationality is needed to organize nationality kindergarten education and nationality school education. If the threshold is not fulfilled, the conditions for specific supplementary nationality education should be created. Such supplementary education may be organised by the nationality’s self-government (article 22(3)). As it seems to be indicated by Article 160(2), which is contained in transitional provisions, nationalities’ children may also opt for Hungarian-language education.

57. The situation of the Roma children is dealt with in a specific way. Since, as indicated by the authorities, most of the Roma do not speak the Roma language, the Act provides in their respect for education in Hungarian language as the main option, except the cases where, upon request by their parents, the concerned schools are required to provide teaching of the Roma language (or Beás, for the members of the specific group speaking this language).

58. The Venice Commission welcomes the legislator’s effort to accommodate the particular educational needs that may exist amongst the nationalities of Hungary, although sometimes in a complicated and confusing manner.

59. The Venice Commission notes that the Nationalities Act does not require the establishment of a fixed and permanent number of educational institutions covering all the levels of the nationality education, but it entrusts the competent authorities to arrange year by year the solution enabling them to respond to the needs and thus comply with the obligation of the nationality education. This is confirmed by art. 83.7 of the Act CXC of 2011 on national public education, which provides for an yearly investigation of the “education held in the nationality language“. The Venice Commission is of the view that, while flexibility is commendable, this approach may result in uncertainty with regard to the stability and continuity of minority education and have a negative impact on the parents’ choice as to their children education (nationality language education//Hungarian language education).

60. The “competent authority” may be either the public authority (local authority, metropolitan or county government) or the nationality self-governments, which are provided the right to establish and maintain institutions of public education and/or to take over already established such institutions (article 24 (1)). The Act regulates in detail the conditions under which such transfers are possible as well as the related agreements and the procedural rules (article 25). Nevertheless, the inter-relations between the provisions regulating the conditions required for establishing nationality education schools/classes/groups (article 22 (5)) and those dealing with the actual educational self-governance of the nationalities (article 24 (1)) are not sufficiently clear and may lead to misunderstanding as to the distribution of tasks between nationalities’ self-governances and the public authorities.

61. Also, according to article 160, education in mother tongue and teaching of the mother tongue are subject, in addition to the already mentioned conditions, to the local opportunities and needs³². Since this provision recognizes a certain degree of discretion to the authority which is competent on the matter, increased clarity would be needed with regard to the authority entitled to decide and the participation of nationality self-governments in that decision.

62. The provisions dealing with the funding of nationality education (article 26; article 30) would also need further clarification, in particular as regards the resources allocated by the State - and the modality for accessing them - to the nationality self-governments which are running educational establishments. Since it entrusts nationality self-governments with operating rights of public educational institutions, the Act should provide for detailed and explicit rules with regard to their funding and/or make clear reference to the applicable provisions in other laws³³.

³² See in this respect article 10.2 of the Framework Convention.

³³ A general reference to the Act on public education and the legal rules on the operation of state finances is made in article 24 (1) of the Law.

e) Cultural development of nationalities. Access to media

63. The Nationalities Act CLXXIX of 2011 also guarantees the rights of nationalities related to culture, cultural development and access to the media. The Venice Commission wishes to underline the efforts the Hungarian authorities make to support the preservation and development of the cultural and religious heritage of the nationalities and to make it possible to broadcast national minority programmes in their own languages.

64. As the Advisory Committee stated in its opinions, the Hungarian Authorities have made already considerable efforts in the past *“to ensure the continuation of improvements in the protection of the rights of persons belonging to national minorities and to implement the legislation in force in this field. Substantial financial resources have been released to ensure the full application of these measures.”*³⁴

65. Articles 33 to 43 of the Nationalities Act, dealing with the cultural self-administration of nationalities, regulate modalities for consulting nationality self-governments on cultural-related decisions of interest for their communities and explicitly entrust nationality self-governments with the right to establish and maintain nationality cultural institutions. In addition, they authorize the transfer to those bodies of the operating rights of cultural institutions - established by others - that fulfil nationality cultural duties “in at least seventy-five per cent” and satisfy the cultural needs of the nationality concerned “in at least seventy-five per cent”. Detailed rules are provided as to the agreements required for such transfers and subsequent operation duties incumbent on the transferee nationality self-governments. The term of reference of this ratio is nevertheless not clear and the concerned legislative provision (article 37 (1)) seems to be difficult to interpret in the absence of additional explanatory rules. It is not clear either whether the transfer of rights is mandatory or the coexistence of different institutions is possible without financial difficulties for the nationality cultural institutions.

66. It is regrettable that the financial dimension of the mechanism set up by the Act, essential for its effective implementation and for giving life to the minorities’ cultural autonomy, is covered by one single provision, article 39 (6), which only makes a general reference to the Act on the central budget. This is especially important since, during the last period, the national minorities have experienced in Hungary serious financial difficulties, having an adverse impact on the implementation of numerous cultural projects and on their prospects in this field. In the Commission’s view, adequate mechanisms for accessing state funds should be established, in consultation with nationalities’ representatives, as part of the implementation of the Act. The adoption of specific and detailed financial rules and procedures could be one important way to provide clarity in this respect.

67. The Venice Commission welcomes the efforts that are made to guarantee the right to acquire information in one’s mother tongue from both print and electronic media and to provide for broadcast programmes in minority languages on the public radio and television channels (see articles 44 to 49 of the Act regulating nationalities’ media-related rights as well as article 6 (3), which introduces a numerical threshold in connection with to media-related rights and article 6 (4) on the consultation of nationalities and their self-governments in this field).

68. At the same time, it reiterates the concern already expressed by the Advisory Committee to find a solution to the problem that these minorities’ programmes often still are broadcasted at off-peak times when few people are able to listen or to watch them³⁵. It considers it important that the authorities find ways to provide more effective guarantees for the nationalities in this field, including in the specific regulations of the public radio and television services.

³⁴ See Advisory Committee on the Framework Convention for the Protection of National Minorities, Third Opinion on Hungary adopted on 18 March 2010, ACFC/OP/III(2010)001.

³⁵ Advisory Committee on the Framework Convention for the Protection of National Minorities, Third Opinion on Hungary adopted on 18 March 2010, ACFC/OP/III(2010)001. § 93-95

f) Language rights

69. The Nationalities Act contains several provisions on the right to use the mother tongue in private and public life. While article 12 (1) a), part of Chapter III dealing with *Individual Nationality Rights*, guarantees the individual right to “freely use his mother tongue verbally and in writing”, the specific conditions for using these languages shall be guaranteed by the State “in the cases determined in a separate rule of law” (article 5 (1)). The enjoyment of this right therefore depends, in specific cases, on separate acts. For instance, while it allows the use of the nationalities’ languages in Parliament, Article 5 (1) contains no indication on the conditions, in particular the financial ones, under which the nationalities may benefit from this right in practice. Also, according to article 5 (2), the use of the mother tongue in civil and criminal proceedings and in public administration proceedings is based on the relevant procedural laws.

70. The Commission indeed notes that the use of minority languages (“native, regional, or nationality language” in judicial proceedings is regulated by article 6 of the Code of Civil Procedure Act III of 1952 and article 9 (as well as article 114 and 339) of the Act XIX of 1998 on Criminal Proceedings, reference being made to the international agreements to which Hungary is a Party.

71. In addition to the general guarantees and corresponding State obligations in the field of minority language protection, the Act provides indication (article 5 (4) and (5) and article 6) with regard to the use of census data as a precondition for the implementation of the nationalities’ linguistic rights. This concerns in particular those rights whose implementation has a territorial dimension, such as the use of minority languages within and with the local public administration and for topographical and other local indications. As specifically indicated by the Hungarian authorities, according to the Nationalities Act the subject of nationality language rights is not only the individual, but the nationality community as well.

72. The Venice Commission notes in this regard that the ratio, as registered in the census, of a nationality within the local population has a different relevance for the implementation of nationalities’ rights: *ten per cent* for the use of the nationality language by the local administration for its documentation and for broadcasting regular nationality public service programmes, and *twenty per cent* for the decisions of the board of representatives, the bilingual inscriptions and the recruitment of persons with minority language knowledge within the local public administration. As already mentioned, the use of the data from the 2011 population census as a basis for the enjoyment of the above-mentioned rights has raised concerns amongst the minority communities due to the allegedly insufficient information available, when the census was conducted, on the importance and relevance of the ethnic data for the implementation of minority protection measures (see § 43 above).

73. The Venice Commission wishes to recall that, as already stated in its Opinion on the Act on the State Language of the Republic of Slovakia³⁶ and the Opinion on the Draft Law on Languages in Ukraine³⁷, it is the responsibility of the legislator to strike a fair balance between the protection of the right to use the minority language and the protection of the official State language, which has to be able to play its role as an integrative factor by ensuring mutual communication among and within the constituent parts of the populations and by maintaining the cohesion between the different linguistic groups of the country. In this respect it welcomes - subject to the provision of adequate funding - the fact that the use of the mother tongue in the boards of representatives of local municipalities and in the minutes and decisions of these boards, is not to the detriment of the use of the Hungarian language (article 5 § (4) and (5))³⁸. The Venice Commission wishes to stress in this respect that, to avoid additional financial burden and workload for the municipalities concerned, additional administrative and/or financial

³⁶ CDL-AD(2010)035, § 134

³⁷ Opinion on the draft law on languages in Ukraine, adopted by the Venice Commission at its 86th Plenary Session (Venice, 25-26 March 2011), CDL-AD(2011)008, § 56.

³⁸ According to the Explanatory Report to the Framework Convention (in relation to article 14. 3 of the Framework Convention), “knowledge of the official language is a factor of social cohesion and integration”.

means should be provided, in particular for the translation of the documents which should be available, according to the Nationalities's Act, in both languages.³⁹

74. The Venice Commission notes in this context that, according to Article 2 (2) of the Constitution, nationalities living in Hungary shall participate in the work of the Parliament as defined by a cardinal act. The Act CCIII of 2011 on the elections of Members of Parliament of Hungary⁴⁰, adopted in December 2011, includes provisions to enable nationalities to be represented in Parliament, through a system of *preferential mandates and spokespersons* (for the nationalities having failed to meet the required conditions for a preferential mandate). The new system will be applied for the first time at the 2014 general parliamentary elections (see for details the Joint Venice Commission - OSCE/ODIHR Opinion on the Act CCIII on the Elections of Members of Parliament of Hungary⁴¹).

g) Public institutions in charge of the protection of nationalities

75. In the previous constitutional order there was an independent and specialized ombudsperson for the protection of minority rights. As required by the new Constitution, one single Commissioner for Fundamental Rights has replaced the previous four parliamentary commissioners (specialized ombudspersons). The Commissioner's general responsibility is to "protect fundamental rights". His or her deputies are vested with the task specifically to "defend the interests of future generations and the rights of nationalities living in Hungary" (Article 30.2).

76. According to article 8 of the Nationalities Act "*the deputy of the commissioner of fundamental rights responsible for the protection of the rights of nationalities living in Hungary shall monitor the enforcement of the rights of nationalities living in Hungary and shall take the necessary measures as set forth in a separate rule of law.*"⁴²

77. The abolition of the position of an independent, separate and autonomous minority ombudsperson has raised some concerns. In its Opinion on the new Constitution of Hungary, the Venice Commission acknowledged "*that states enjoy a wide margin of appreciation with regard to such institutional arrangements, which depend to a large extent on the domestic specific situation*"⁴³. In the Commission's view, it is however important that the reorganisation of the institution of the ombudsperson(s) "*does not entail a lowering of the existing level of guarantees for the protection and promotion of rights in the field of national minority protection.*"

78. The Commission has only limited information on the actual operation of the new mechanism set up by the new Constitution. It has been informed that the Deputy Commissioner of Fundamental Rights responsible for the protection of the rights of nationalities, while subordinated to the new Commissioner for Fundamental Rights, will be able to continue monitor the situation of Hungary's nationalities and the main shortcomings and challenges that need to be addressed in this area.

79. The Commission notes in particular that the Deputy Commissioner, in his Work plan for in the reorganised Office, has included analysing the impact of the new Nationalities Act, and of certain sectoral legislation, on the exercise of the rights of nationalities. According to the information provided to the Venice Commission, his preliminary assessment of the new Act on Nationalities was the basis for the petition filed (on the 27th April 2012) by the new Commissioner for Fundamental Rights to the Constitutional Court of Hungary, in relation to several provisions of the Nationalities Act (see §29 above). It should be noted in this context that, as established by the new Act on the Commissioner for Fundamental Rights, the Commissioner may initiate with the Constitutional Court the *ex-post* review of the conformity of a rule of law, or of a provision thereof, with the Constitution. The Nationalities Act also stipulates

³⁹ CDL-AD(2010)035., § 27, §84.

⁴⁰ CDL-REF(2012)003

⁴¹ CDL-AD(2012)0..

⁴² See also Act CXI of 2011 on the Commissioner for Fundamental Rights.

⁴³ CDL-AD(2011)016, § 115.

in its article 10 (2) that “*The lawful exercise of the responsibilities and powers of nationality self-governments comes under constitutional court and court protection*”.

80. While the possible non-conformity of the contested provisions with the Hungarian Constitution and/or applicable international standards is a legitimate source of concern, the attention paid by the new Commissioner for Fundamental Rights to nationalities and their problems is an encouraging sign for these communities and should be commended.

VI. Conclusions

81. Hungary has continued to pay particular attention to the promotion and protection of minority rights and to make specific efforts to ensure protection and preservation of the ethnic, cultural and linguistic identity, traditions and cultural heritage of its nationalities.

82. Act CLXXIX of 2011 on the Rights of Nationalities, adopted by the Hungarian Parliament on 19 December 2011 as part of the process of implementation of the new Constitution, confirms Hungary’s internationally recognised commitment to minority protection, based on the applicable international standards and the particular circumstances prevailing in the country.

83. The Nationalities Act recognises and guarantees individual and collective rights to its thirteen recognised nationalities and their members in the main areas of interest for the protection of their identity - education, culture, private and public use of the mother tongue, access to media and participation - and aims to improve and strengthen the available institutional arrangements for nationality self-government in these areas.

84. These features are positive and should be welcomed. The new framework for minority protection as provided by the Nationalities Act appears, however, to be particularly complex and to be at times, excessively detailed and nonetheless sometimes to lack legal clarity. This may result in difficulties in its implementation and have an adverse impact on the autonomy provided by law to Hungary’s nationalities. In particular, the overly-detailed regulation of nationality self-governments’ operation may lead to undue restriction of the free exercise by the minorities of their rights and by nationality self-governments of their competences.

85. The status of the Act as a cardinal law, requiring a special majority for its amendment, may also be a source of difficulties in the context of possible future amendments.

86. The Venice Commission stands ready to assist the Hungarian authorities in the future should they need its assistance.