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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

**DRAFT OPINION
ON THE DRAFT LAW
OF THE REPUBLIC OF ROMANIA
CONCERNING THE SUPPORT TO
ROMANIANS LIVING ABROAD**

on the basis of comments by

**Mr Giorgio MALINVERNI (member, Switzerland)
Mr Franz MATSCHER (member, Austria)
Mr Pieter VAN DIJK (member, the Netherlands)**

I. Introduction

1. On 28 May 2004, the Romanian Prime Minister requested the opinion of the Venice Commission on the draft law concerning the support for Romanians living abroad (CDL(2004)053).
2. Messrs Pieter Van Dijk, Giorgio Malinverni and Franz Matscher were appointed to act as members rapporteurs.
3. The present opinion, which was drawn up on the basis of their comments, was adopted by the Commission at its ... Plenary Session (Venice, ...)

II. Analysis of the Law

4. In its Preamble, the draft law states *inter alia* that “the guidelines stipulated by the European Commission for Democracy through Law (the Venice Commission) in the ‘Report on the Preferential Treatment on National Minorities by their Kin-State’ (Venice, 19 October 2001)” have been taken into account.
5. This clearly appears from certain elements of the draft. Thus, Article 4 of the draft, which stipulates that “The provisions of this Law shall be applied without prejudice to the principles of territorial sovereignty, good neighbourliness, reciprocity, *pacta sunt servanda*, respect of human rights and fundamental freedoms and non-discrimination”, is directly derived from the Venice Commission’s report. The same holds good for the first paragraph of Article 5, which states that “The implementation of the present Act shall proceed on the basis of the conclusion of agreements and programs with the States where there are persons (of Romanian ethnic origin) (...) and in line with provisions (...) of the Venice Commission’s Report on preferential treatment of national minorities by their Kin-State (...)”.
6. The Commission welcomes that the Romanian authorities drew direct inspiration from its report on “the preferential treatment of national minorities by their kin-State” and further wish to receive the Commission’s opinion on the draft law. The Commission considers indeed that this open and transparent attitude contributes towards showing the intention of Romania to implement this law in conformity with the requirements which have been identified by the international community, notably the Venice Commission and the OSCE High Commissioner on National authorities.

Scope of application *ratione personae* of the law

7. Unlike other similar pieces of legislation on the so-called “kin-minorities”, this law seems to be applicable also to Romanian *citizens* living abroad. However, there is no need to extend its reach to Romanian citizens who are at any rate partly under jurisdiction of Romania and so sufficiently protected.

Assessment of the implementation of the Law

8. In paragraph 2 of Article 5 of the draft law, it is provided that “the Government of Romania shall periodically assess the implementation of the provisions of the agreements and programmes concluded with the States where there are persons of Romanian ethnic origin, and European standards and documents regarding the protection of persons belonging to national

minorities to which the respective States are parties.” In the Commission’s opinion, it is implicit that the principles set out in the Venice Commission’s report are included in the “European standards and documents” referred to in this provision.

9. It is not clear from the provision if and to what extent the periodical assessment by the Government is meant to be exclusive, or whether it leaves room for any form of judicial review. Moreover, the draft text does not specify how the periodic assessment will be organised. It seems implicit, in this respect, that to the extent that the implementation of this law is to be carried out, according to Article 5 of the draft law, through bilateral agreements and programs, the States concerned will have to be involved in the assessment.

10. In the Commission’s view, it would be appropriate that the text of the law, or its explanatory memorandum should further clarify and specify the procedure(s) of review. In that context, the partnership protocols, referred to in paragraph 2 of Article 3 of the draft, will also be of great importance for the (review of the) implementation of the present Law in conformity with international standards.

11. The first paragraph of Article 5 of the draft stipulates, as mentioned before, that the present Law shall be implemented on the basis of the conclusion of agreements and programs with the States where there are persons of Romanian ethnic origin. This presupposes that such agreements or programs are in existence with all the States concerned, and preferably in force at the moment of the entry into force of the present Law. The explanatory memorandum should contain the pertinent information on the state of affairs. It is pointed out in this context that, for instance, no bilateral agreement on friendly neighbourhood relations exist between Romania and Moldova at the moment.

Composition and membership of the Congress of Romanians living abroad

12. Article 2 of the draft provides that the Romanian authority competent to implement the provisions of the present Law is the Department for Romanians Living Abroad. In addition, Articles 6 and 7 of the draft assign an important role to the Congress of Romanians Living Abroad, and the Council to be elected by it. According to the fourth paragraph of Article 7, the Council “shall provide consultancy and assistance for the competent governmental institutions with which it collaborates in order to accomplish and implement the programs devised for the Romanian communities.”

13. In view of their role, the composition of the Congress and Council are very important. According to Article 8, under i) of the draft, all Romanians living abroad have the right to participate in the Congress. However, it is not specified whether certain membership requirements apply. There is the general requirement, laid down in the first paragraph, under a) of Article 9 of the draft, that the person concerned must have declared that he or she assumes the Romanian cultural identity. This requirement seems to presuppose the requirement that the person concerned is of such an age that he or she can make such a declaration personally and freely, unless a parent or guardian may make the declaration on his or her behalf. The requirement under b) of the same provision that entitlement presupposes “appropriate linguistic knowledge” also alludes to a certain age requirement. The issue of membership requirement should be clarified in the text of the law or specified in its explanatory memorandum.

14. It should also be regulated how and where the membership of the Congress will be registered, on the basis of the document referred to in paragraph 4 of Article 9 of the draft.

15. In addition, it may be advisable to specify in the text or explanatory memorandum the number and composition of the Council of Romanians Living Abroad, or to specify that this is to be determined by the Congress. In the draft, the third paragraph of Article 7 refers only to “the organization and functioning of the Council”.

Non-discrimination

16. As mentioned before, Article 4 of the draft states that its provisions shall be applied without prejudice to, inter alia, the principle of non-discrimination.

17. Article 8 of the draft law lists the rights Romanians living abroad shall enjoy. To the extent that these rights are granted to Romanians living abroad only, the latter enjoy preferential treatment. In order for such treatment not to amount to discrimination, it requires an objective and reasonable justification as well as proportionality between the aim sought and the means employed. From Article 1, under a) of the draft it may be concluded that the objective and reasonable justification, and the aim sought, consist in the preservation, promotion and development of the cultural, ethnic, linguistic and religious identity of persons of Romanian ethnic origin and persons sharing a common Romanian cultural identity, residing outside Romanian borders.

18. For the reasonability and proportionality of the preferential treatment, it is important that the second paragraph of Article 8 of the draft provides that “Any person pursuing his/her studies/teaching abroad in the Romanian language, can benefit, irrespective of his/her ethnic origin and with no discrimination whatsoever, at his/her request, of the rights mentioned in letters a)–e).”

19. The general formulation of the rights under c)-e) raises certain doubts. These rights concern study facilities, scholarships and training in Romania “at all levels and forms of education”, without any specific restriction to the Romanian language or culture. Moreover, according to paragraph 8 of Article 11 of the draft, Romanian students from abroad are also provided with free accommodation and other assistance during their study in Romania. It is not clear why a limitation of these facilities to Romanians living abroad and other persons who teach or study the Romanian language abroad would be justified, unless there is a clear link to the Romanian language or culture. These provisions of Article 8 of the draft will have to be specified or reconsidered. The same holds good, mutates mutandis, for the very broad formulation of Articles 12 and 13 of the draft, where there is no express link to the Romanian language and culture.

20. In the Commission’s opinion, furthermore, Article 11 § 8, providing for the free accommodation in student hostels and other facilities for those Romanians living abroad who wish to study or obtain training in Romania without requiring any further criteria, might lead to discriminatory practices in respect of Romanian students who would instead have to pay for accommodation and subsistence expenses.

Respect for the legislation and regulations of the home-State and consent of the latter

21. In respect of the rights listed in Article 8 e) to h) of the draft law, it would seem important, even though it is implicit, to specify that assistance can be sought and obtained from Romania

“in compliance with the applicable legislation and regulations of the relevant home-State” and “with the consent of the relevant home-State”.

Structure of the Law

22. As regards the structure of the law, it would seem appropriate to follow the one indicated in Article 1 of the draft, i.e. first the rights of the Romanians living abroad and afterwards the attributions of the competent authorities (and of the Center for Romanians living abroad). Accordingly, current Articles 8-9 should precede current Articles 2-7.

Further suggestions

23. Article 6 § 1 provides that the Congress of Romanians Living Abroad will be convened annually under the aegis of the Romanian parliament in Romania *or abroad*. It would not seem appropriate to provide for the possibility of convening it elsewhere than in Romania.

24. It would seem useful to specify in Article 8 § 1 b) that linguistic knowledge “of the Romanian language ” is required.

25. The wording of Article 12 is very general particularly as regards the terms “assistance” and “current needs”. It would seem appropriate to specify to a greater extent what sort of assistance the Romanian Government is ready to give, at least by making explicit reference to the rights listed in this law.

III. Conclusion

26. In conclusion, the Commission considers that the draft law is generally in conformity with European and international principles and standards, as referred to notably by the Venice Commission in its report on Preferential Treatment of National Minorities by their Kin-State.

27. In the Commission’s opinion, however, a number of provisions should be clarified and specified. In particular, in order to avoid any risk of discriminatory treatment, for some of the rights listed in Article 8 of the draft (rights to study in Romania, to apply for scholarships, to further training, to receive textbooks and other material), to which Romanians living abroad will be entitled, an express link to the Romanian language and culture will have to be made to justify the preferential treatment. In addition, it is necessary to address the issue of a possible discrimination in respect of Romanian students in respect of free accommodation and other facilities which it is planned to grant to Romanians living abroad wishing to study in Romania.

28. Confirmation needs to be given that at the moment of entry into force of the present law, bilateral or multilateral agreements are in existence with all the States on whose territory persons of Romanian ethnic origin live.

29. A number of further minor suggestions are made, which would even improve the law.