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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**OPINION ON
THE LAW FOR THE ELECTION
OF LOCAL PUBLIC ADMINISTRATION AUTHORITIES
IN ROMANIA**

**Adopted by
the Council for Democratic Elections
at its 11th meeting
(Venice, 2 December 2004)
and the Venice Commission
at its 61st plenary session
(Venice, 3-4 December 2004)**

on the basis of comments by

**Mr Ugo MIFSUD BONNICI (member, Malta)
Mr Pieter VAN DIJK (member, Netherlands)**

I. Introduction

1. At its meeting on 24 May 2004, the Bureau of the Parliamentary Assembly of the Council of Europe invited the Venice Commission to give an opinion on the conformity of the principles set out by Romania's Law on local elections (No. 67/2004) (hereinafter: the Law, CDL(2004)115) with the Council of Europe's basic legal instruments such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Framework Convention for the Protection of National Minorities and the European Charter for Local Self-Government. This request arose out of a Motion for a resolution presented by Mr Braun and others on the Law on local elections in Romania (Doc. 10160).

2. Messrs Ugo Mifsud Bonnici (member, Malta) and Pieter van Dijk (member, Netherlands) were appointed as rapporteurs. Their comments have been consolidated into the present opinion.

3. This opinion was adopted by the Council for Democratic Elections at its 11th meeting (Venice, 2 December 2004) and by the Venice Commission at its 61st plenary session (Venice, 3-4 December 2004).

II. General comments

4. The law under consideration is an "organic" law providing for the election of citizens to positions in which they exercise state authority.

5. As a general comment one can say that the law itself is acceptable, and does not differ substantially from similar laws found in other democratic countries, subject to, and except for, what will be said *infra* with regard to Article 7. If anything, the law errs on the side of superabundance of detail making it difficult to establish the true and precise meaning of some parts of the law. However, this might be due to the English translation in question.

6. Article 2, paragraph 1 of the present Law states that Romanian citizens shall exercise their voting rights equally, without privileges or discriminations, while Article 3, paragraph 1 of the law grants the right to vote only to citizens aged 18. Article 3, paragraph 3 implies that only residents of the commune, town, municipality, or administrative-territorial subdivision of the municipality concerned are entitled to vote. Article 4 states that the same requirements of citizenship and residence apply for the right to stand for election. According to Article 16(3) of the Constitution, "access" or eligibility to the public offices or dignities is open to Romanian citizens only.

7. Article 5 of the Law justifiably excludes from the right to vote (a) mentally retarded or insane people who are laid under an interdiction; and (b) persons deprived of their voting rights for a time period set by a final court decree. This is a provision one expects to find in most democracies.¹ The same article then spells out the exclusion from eligibility under two categories, i.e. (a) those who are mentioned under Article 40(3) of the Constitution, that is: Judges of the Constitutional Court, Advocates for the People, magistrates, active members of the armed forces, policemen and other civil servants as defined by an organic law, and (b) those with no right to vote according to the first subarticle. These are all very common in democracies.

¹*Ibid.*, point I.1.d.

8. In retrospect and also having seen the Report of the Congress of Local and Regional Authorities of Europe (CG/Bur(11)25, adopted by their bureau on the 12th July 2004) after observing the elections held under this law on the 6th of June 2004, it seems that the conduct of the elections, with the exception of the matters raised concerning article 7, was smooth, fair, and as expected in a functioning democracy.

9. That the present Law makes the right to vote and to stand for election subject to the requirements of citizenship and residence is not in violation of any imperative rule of international or European law concerning universal suffrage. However, a tendency is emerging to grant local political rights to 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.² 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.

10. For the rest, this opinion will not comment in detail provisions which do not give rise to controversy and will focus on the specific question of representation of national minorities.

III. The provisions on minority representation

A. Background

1. Background of the request

11. On 27 April 2004 a motion was tabled in the Parliamentary Assembly of the Council of Europe by Mr Braun and others concerning Law No 67/2004 on Local Elections, adopted by the Parliament of Romania and published by the Official Gazette of that country on the 29th of March 2004. The motion notes that the Law imposed extra conditions for participation in these elections by National Minorities' Parties not represented in Parliament; and that these conditions were discriminatory when compared with those of Parties of National Minorities who were already represented in Parliament. The motion claims that the conditions are objectively difficult to satisfy in the case of the Hungarian Minority, in that to qualify, they would have to submit lists of members of at least 25,000 citizens together with their full name, date of birth, address, registration number of the identity document and signature. The motion laments that the administrative measures implementing the Law are even more discriminatory.

12. The motion has not been discussed as yet by the Assembly and therefore commits only the signatories, who come from different Parliamentary groups, and different countries. The motion requests a report to the Assembly about the Law and the administrative practices implementing it.

²CDL(2002)023rev, point I.1.b.ii and point 6.b of the explanatory memorandum.

13. This motion follows a complaint brought in Romania by the Hungarian Civic Alliance, an organisation which describes itself as "safeguarding the interests of the Hungarian national community in Romania, (*and*) which is a legal entity registered in August 2003". It also presents itself as an alternative to the Democratic Alliance of Hungarians in Romania (DAHR) with the intention of ending what it considers the monopolistic status of the DAHR.

14. The Hungarian Civic Alliance, well aware of the desirability of maintaining unity for the purpose of assuring representation at the Parliamentary level, insisted in its appeal, dated 5th of May 2004, to the European Commission, to the Council of Europe, to the O.S.C.E. and to various Governments, that "because of the 5% threshold for admittance to Romania's Parliament, they would be willing to cooperate with other Hungarian political forces in order to preserve the ethnic Hungarian representation in Parliament". In fact, they have not attacked the relevant provision of the Constitution, but only the provisions of the law on *local* elections.

15. Though the complaint contains a grapeshot attack and alleges other democratic deficiencies, the requested report only concerns this Law (67/2004) and its supposed violation of the (a) Copenhagen criteria; (b) the European Convention; (c) the Framework Convention on the Protection of National Minorities; and (d) The European Charter for Self-Government.

2. Constitutional background

16. According to the Constitution of the Republic of Romania adopted in November 1991, as revised in 2003, citizens belonging to a national minority have special rights of representation within the National Parliament [Article 62(2)]. Under that subarticle: *Organisations of citizens belonging to national minorities, which fail to obtain the number of votes for representation in Parliament, have the right to one Deputy seat each, under the terms of the electoral law. Citizens of a national minority are entitled to be represented by one organisation only.* According to the best possible interpretation, the restriction was meant to be tied to the "concession" of one Deputy seat, to those national minority organisations which fail to obtain in the usual way the required quota. This constitutional provision was first meant to ensure that as many minorities as possible would be present in Parliament. The last sentence can also be construed to mean that only one organisation from a particular national minority would be entitled to the allocation of the non-sufficiently voted seat in Parliament.

17. It is particularly relevant to examine this Law's Constitutional status. The Romanian Constitution, in Article 73, classifies Laws into Constitutional, organic and ordinary laws. The Law in question is an organic law under article 73(3). Article 76(1) specifies that organic laws have to be passed by both Chambers of Parliament with a majority vote of their members [not merely those then present]. No exception has been levered against Law 67/2004 on this score. The Law is organic in that it is contributing towards the proper functioning of an organ of the Romanian State: its local government.

18. Of special note is the fact that the Constitution in its very first Article entitled "General principles" declares:

" 1. Romania is a sovereign, independent, unitary and indivisible National State. 2. The form of government of the Romanian State is a Republic. 3. Romania is a democratic and social State governed by the Rule of Law, in which human dignity, the citizens' rights and freedoms,

the free development of human personality, justice and political pluralism represent supreme values... and shall be guaranteed".

19. Article 40(2) of the Constitution provides that political parties or organisations "*which by their aims or activities, militate against political pluralism (...) shall be unconstitutional*".

20. Under Section 2 of the Constitution, entitled "Local Public Administration", there is Article 120 entitled "General Principles" which reads:
"Public Administration in territorial- administrative units shall be based on the principles of decentralisation, local autonomy and deconcentration of public services".

21. Article 121 entitled "Communal and Town Authorities" provides:
*"1. The public Administration Authorities, by which local autonomy in communes and towns is implemented, shall be the local Councils and Mayors, elected, in accordance with the law.
2. The Local Councils and Mayors shall act as autonomous administrative authorities and manage public affairs in communes and towns, in accordance with the law.
3. Authorities under paragraph (1) may also be constituted in the territorial-administrative subdivisions of municipalities"*.

22. Article 122 provides for County Councils as coordinating units for County wide services.

23. Given the principle of local authority and decentralisation as conceived in the Romanian Constitution, there is no doubt that the election of local public administration authorities is to be regarded as a vital exercise of the democratic rights of all Romanian citizens.

24. In Title II, Chapter 1: General Provisions, Article 15 entitled "Universality" reads:
"1. All citizens enjoy the rights and freedoms granted to them by the Constitution and other laws, and have the duties laid down thereby. 2. The law shall only act for the future, except for the more favourable criminal or administrative law".

25. Article 16 reads as follows:
*"1. Citizens are equal before the law and public authorities, without any privilege or discrimination.
2. No one is above the law.
3. Access to public, civil or military positions or dignities may be granted, according to the law, to persons whose citizenship is Romanian, and whose domicile is in Romania"*.

3. The international standards

26. The request for an opinion referred to the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Framework Convention for the Protection of National Minorities and the European Charter for Local Self-Government. The appeal by the Hungarian Civic Alliance also mentions the Copenhagen Criteria. In addition, the International Covenant on Civil and Political Rights, as well as the Code of Good Practice in Electoral Matters of the Venice Commission, will be taken into account.

3.1 The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

27. According to Article 3 of the First Additional Protocol to the ECHR, “*The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the will of the people in the choice of the legislature*”. Furthermore, according to Article 14 ECHR, “*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as... political or other opinion ...association with a national minority...or other status*”. Even if Article 3 of the First Additional Protocol does not apply to local elections, this provision guarantees the principles of Europe’s electoral heritage: universal, equal, free, secret and direct suffrage, which are basic principles of the Council of Europe and of democracy in general.

3.2 The Framework Convention for the Protection of National Minorities

28. This Convention³ declares in Article 1: “*The protection of national minorities and of the rights and freedoms of persons belonging to those minorities forms an integral part of the international protection of human rights, and as such falls within the scope of international co-operation.*”

29. Article 3 is directly relevant in that it provides: *1. 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 rights which are connected to that choice. 2. Persons belonging to national minorities may exercise the rights and enjoy the freedoms flowing from the principles enshrined in the present framework Convention individually as well as in community with others.*

30. Article 4 of the Convention states in its first paragraph that the Parties undertake to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law, and that any discrimination based on belonging to a national minority shall be prohibited.

31. Article 15 of the Convention states that the Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, and in particular those affecting them.

3.3 The European Charter for local Self Government

32. Article 3(2) of this Council of Europe Charter of 15 October 1985⁴ provides specifically that local councils or assemblies are to be elected by secret ballot on the basis of direct, equal and universal suffrage. This article is entitled “The concept of local self government”. One must interpret the secrecy, the direct nature, the equality and the universality as essential ingredients of the concept of local self government, seen as a component of a country’s democratic institutions.

3.4 The International Covenant on Civil and Political Rights

³ETS 157.

⁴ETS 122.

33. Article 25 of the International Covenant on Civil and Political Rights recognises the right to vote and the right to stand for election.

3.5 The Code of Good Practice in Electoral Matters

34. The Code of Good Practice in Electoral Matters was adopted by the Venice Commission at its 52nd Plenary Session and then approved by the Parliamentary Assembly and the Congress of Local and Regional Authorities. A Declaration of the Committee of Ministers expressed its support to this document on 13 May 2004. Paragraph I.2.4, entitled "Equality and National Minorities", is relevant and states that:

“a. Parties representing national minorities must be permitted.

b. Special rules guaranteeing national minorities reserved seats or providing for exceptions to the normal seat allocation criteria for parties representing national minorities (for instance, exemption from a quorum requirement) do not in principle run counter to equal suffrage.

c. Neither candidates nor voters must find themselves obliged to reveal their membership of a national minority.”

3.6 The Copenhagen criteria (European Union)

35. Among the criteria for admission to the European Union, one finds "respect for and protection of the rights of minorities". It is not claimed that these criteria, taken as a whole, can be quoted as setting universal minimum standards for Democracy. However, there is no doubt that the respect and protection of the rights of minorities is a universal essential requirement.

3.7 The Copenhagen document (CSCE)

36. According to the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, adopted in Copenhagen on 29 June 1990:

“5.1. free elections ... will be held at reasonable intervals by secret ballot or by equivalent free voting procedure, under conditions which ensure in practice the free expression of the opinion of the electors in the choice of their representatives.

...

6. The participating states declare that the will of the people, freely and fairly expressed through periodic and genuine elections, is the basis of the authority and legitimacy of all government.”

...

7. To ensure that the will of the people serves as the basis of the authority of government, the participating States will:

...

7.5. respect the right of citizens to seek political or public office, individually or as representatives of political parties or organizations, without discrimination;

7.6. *respect the right of individuals and groups to establish, in full freedom, their own political parties or other political organizations and provide such political parties or organizations with the necessary legal guarantees to enable them to compete with each other on a basis of equal treatment before the law and by the authorities;*
...”

4. The provisions of the Law

37. Whilst Article 6 of the Law stipulates that candidatures for local councillors and mayors can be put forward by i. political parties; ii. political alliances; iii. organisations of national minorities, as well as by iv. the candidates themselves, independently, Article 7, in its paragraph 2 seems to consider as organisations of National Minorities only those represented in Parliament, adding in paragraph 3 that "*candidatures may also be put forward by other [that is those not represented in Parliament] lawfully established organisations of the citizens belonging to national minorities, that shall submit a members' list to the Central Election Bureau. The number of members may not be less than 15% of the total number of citizens who, at the latest census, have declared they belonged to that minority.*" .” According to Article 7, paragraph 4, "*if the number of members needed for meeting the requirements of paragraph (3) exceeds 25000 persons, the members' list shall include at least 25000 persons residing in at least 15 counties of the country and in the Bucharest municipality, but no less than 300 persons for each of those counties and for the Bucharest municipality*". This last paragraph applies to the Hungarian National Minority.

5. Analysis

5.1 Principles of equality and proportional representation

38. Article 1, paragraph 2 of the Law states that the local councils and county councils, as well as the mayors, shall be elected by means of a *universal, equal, direct, secret, and freely expressed ballot*. This provision is in conformity with the right of free elections as laid down for instance in the CSCE Copenhagen Document and Article 3 of the First Additional Protocol to the ECHR in conjunction with the non-discrimination rule laid down in Article 14 of the ECHR, as interpreted and applied by the European Court of Human Rights in its case law.⁵

39. Article 1, paragraph 3 states that local councils and county councils shall be elected in constituencies, based on electoral lists, according to the principle of *proportional representation*. The principle of proportional representation is one of the specifications of the principle of equal suffrage (equal voting power).

40. Article 7, paragraph 1 of the Law contains a special definition of "national minority" for the purpose of the Law: that ethnic group which is represented in the National Minorities Council.

41. According to Article 2 of Decision No. 589 of 21 June 2001 on the establishment of the National Minorities Council, the National Minorities Council is formed by 3 representatives of each of the organisations of the citizens belonging to the national minorities, *represented within the Parliament of Romania*.

⁵See *European Commission for Democracy through Law, Code of Good Practice in Electoral Matters; Guidelines and Explanatory Report, CDL-AD (2002) 23 rev., 23 May 2003, passim.*

42. This definition makes entitlement to the special rights for national minorities, laid down in the law, dependent on a condition that may imply certain restrictions. This may amount to a violation of the obligation of Romania, laid down in Article 4, paragraph 1 of the Framework Convention, to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. It may also block political competition within one and the same national minority, in violation of the principle of pluralistic democracy.

43. An instance of manifest unequal treatment is constituted by the above-mentioned Article 7, paragraph 2 of the Law, which gives a privileged position to those national minorities represented in Parliament, to put forward candidatures for local elections.⁶ These national minorities may present candidates without any further restriction, while other national minorities – or separate organisations within the same national minority - can only present candidates under special, very restrictive conditions detailed under Article 7, paragraphs 3 and 4.

44. It may well be that under the Romanian Constitution and the Romanian Law on Elections to the Chamber of Deputies and the Senate, organisations of citizens belonging to national minorities failing to obtain the number of votes for representation in Parliament have the right to one seat in the Chamber of Deputies. However, not only does this not solve the unequal position of separate organisations within a particular national minority, the right to one seat in the national Parliament is subject to certain requirements which a certain national minority may not be able to meet at the national level, while that national minority has a strong numerical presence at the local level. Precisely as participation of national minorities in public affairs at local level may, in some respects, be even more important for them and their members than participation in the public affairs at the national level, participation should not be made dependent on their numerical representation at the national level.

45. The right to stand for election, and the right to present candidatures, may be subject to certain conditions to guarantee that the candidate concerned will at least have some minimum support. However, these conditions may not be of such a severity that they disproportionately favour groups which are represented in Parliament to the disadvantage of (new) groups which wish to participate in public life. In the opinion of the Venice Commission, the requirement of proportionality has not been met in this case. The conditions for national minorities, or separate organisations within a national minority, not represented in Parliament to present candidates are so severe, that they may appear to be almost prohibitive. Satisfying the 15% and the distribution criteria can be onerous, as to, in effect, render impossible their admission to the election lists, and individual candidates would have either to brave the election standing as independents, or to throw in the towel. It is doubtful whether this virtual exclusion can be justified in a democratic society.

46. In particular, the Venice Commission points out that conditions for participation in local elections should be attuned to the local situation and should not be subject to any condition related to representation at national level. For instance, an organisation of a certain national minority may be highly representative of that national minority in a certain county, even though it does not fulfil the requirement that the number of its members is equal to or more than 15 % of the total number of citizens who, at the latest census, have declared they belong to that minority,

⁶See *Parliamentary Assembly, Motion for a resolution presented by Mr. Braun and others, Doc. 10160, 27 April 2004.*

and even though it would not have at least 300 members in 15 counties of the country. The requirement concerned is even more striking since Article 44 of the Law does restrict the requirement of a certain measure of support to the constituency concerned.

47. The said unequal treatment also runs counter to the principle of proportional representation. In relation to national minorities a deviation from formal proportional representation may be justified to guarantee access of national minorities to representative bodies. The Code of Good Practice in Electoral Matters provides for this in Principle I.2.4 as follows: “*Special rules guaranteeing national minorities reserved seats or providing for exceptions to the normal seat allocation criteria for parties representing national minorities (...) do not in principle run counter to equal suffrage*”.⁷ However, such a measure of “positive discrimination” should not have the effect that it favours one national minority or one group within a national minority to the disadvantage of one or more others to the extent that the latter are not able to effectuate their right to participation in public affairs.

5.2 Political pluralism

48. Whilst pluralism should not be construed to produce a "sorcerer's apprentice" phenomenon of plethora of political organisations, voters choice is at the heart of democracy. It is a principle of wise government not to seek to fragment political entities; it is a denial of democracy to hinder, from above, the development of alternatives. In other words, even if the objective to avoid excessive fragmentation of the elected bodies is legitimate, it must not hinder pluralism excessively. Measures to ensure this have to be found in the electoral system itself (conversion of votes into seats), not in the rules on presentation of candidates. In some areas of Romania the "minority" might be in the majority, in others it would continue to be in the minority as is the case in the whole Republic. In both cases it is salutary and democratic to have choice.

49. The Venice Committee recommends that Article 7 of the Law be amended to guarantee equal participation of national minorities and of organisations within a national minority in public affairs at local level, in particular equal representation in the elected bodies at local level.

5.3 Proportional representation of national minorities

50. On the whole the Constitution and legislation of Romania shows respect and protection for the rights of minorities. Indeed, with regard to the representation in Parliament of ethnic minorities, the treatment is generous.

51. There is no special guarantee in Article 7 or any other provision of the Law that national minorities will be allocated seats in the local representative bodies in proportion to their number in the constituency concerned. Such a guarantee is not required by international or European standards, but may be needed under certain circumstances in order to ensure effective participation in public affairs of the national minority concerned.

52. The presence of only one list for each minority in the political game could help this minority to be represented - proportionally - in the elected bodies. However, this does not justify restricting competition between lists of the same minority. In the free play of political forces,

⁷CDL-AD(2002)023rev, pp.11-12.

one can assume that both voters and candidates would think, and dispute, the consequences of their vote and its possible division between rival groupings. Even in the case that miscalculations may give rise to some unwished for result of loss in representation, the lesson derived from that experience is within the usual scope of the democratic process, where electorates also learn by mistake, and not through the supposed prescient limitation of their choices.

5.4 Identification of membership of a national minority and of the supporters of a list

53. According to Article 7, paragraph 3 of the Law, the organisations of citizens belonging to national minorities must submit a membership list to the Central Election Bureau. This implies the identification of membership of a national minority. As the Venice Commission have stressed before, this may require certain safeguards of confidentiality for those persons belonging to a national minority, for whom being identified as such may create a certain risk.⁸

54. The discussed rules do not infringe upon the principle of the secrecy of the vote. However, the necessity to submit to the Central Election Bureau a list of members including at least 15 % of the members of a minority implies that a great number of citizens have to declare their political preferences and may lead to certain forms of pressure to do so. It would be sufficient that the promoters and candidates of the group presenting itself to the electorate as acting in the national minority interest, as well as those subscribing to a candidature should “discover” their belonging to a national minority as well as their support for this group. However, the law should not require collection of the signatures of more than 1 % of voters in the constituency concerned except perhaps in very small municipalities.⁹

5.5 Access to the media

55. Article 61, paragraph 2 of the Law raises the question of whether there should be room for “positive discrimination” in respect of national minorities. Indeed, their weight in the total population of a county or of the Republic of Romania, respectively, might be so small as to make access to public radio and television services illusory. In this respect they differ from other political alliances in that their membership is limited to persons belonging to the same national minority. It is, therefore, recommended to include in the Law a certain minimum airtime for national minorities’ organisations.

IV. Conclusion

56. In general, the law conforms with the standards of the European electoral heritage and is a further step in the process of Romania’s full European integration. Some improvements could be made, for example concerning the right of non-citizens to vote in local elections, but this is not yet a common European standard. Furthermore, the implementation of the law, as it took place during the 2004 elections, did not raise any particular problem.

⁸See its *Opinion on the Constitutional Law of the Rights of National Minorities in Croatia (CDL-AD(2003)009)*, adopted at its 54th Plenary Session, 14-15 March 2003, point 22.

⁹*Code of Good Practice in Electoral Matters, CDL-AD(2002)23rev, point I.1.3.ii.*

57. However, the provision of Article 7 is problematic. It strongly restricts the possibility of more than one grouping of persons belonging to a national minority to be represented in authorities at local level throughout the country. In practice, this principally affects the Hungarian minority. These restrictions do not appear justified. In particular, they are not justified by the necessity of ensuring unity so as to preserve the electoral weight of a minority, inasmuch as one has to take for granted that electors know how to safeguard their minority interests. It has to be emphasised that these comments only concern local elections.