

THE JUNE 2012 OPINION OF THE VENICE COMMISSION OF THE COUNCIL OF EUROPE ON THE ACT ON THE RIGHTS OF NATIONALITIES OF HUNGARY. PRESENTATION AND ASSESSMENT

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Abstract

The paper undertakes an analysis of the June 2012 Opinion of the European Commission for Democracy through Law (the Venice Commission) of the Council of Europe on the Hungarian Act on the Rights of Nationalities of Hungary, adopted in December 2011. The paper approaches this task having as a reference point the European standards on minority protection, but also the concrete needs of the Romanian minority of Hungary in preserving and developing its cultural identity, effort which might be directly affected by the Act. The paper shows that the Opinion of the Venice Commission acknowledges not only the positive aspects set forth by the Act, but also certain important shortcomings that have to be redressed by further amending the Act. Among these, inter alia, one may identify the following: the fact that, being a “cardinal” law, it is quite difficult to amend it; the fact that it sometimes includes an excessively detailed regulation; that it changes the terminology from “national minority” to “nationality”, with important consequences on the manner of projecting the Hungarian interests in connection with the Hungarian minorities abroad (as well as the fact that the Act consecrates the controversial concept of “collective rights”); it includes a narrow definition of the “nationality”, thus excluding the new minorities and creating some difficulties for the Roma, who are not (by tradition) strictly linked to territory; it does not include sufficient guarantees as to the accuracy of ethnic data collection, especially by censuses; it does not provide for concrete measures to ensure the verification of the mother tongue knowledge by minority electors and candidates for self-governments, thus living place for the perpetuation of the phenomenon of the so-called “ethno-business”; the regulation of education for minorities has a degree of uncertainty with regard to the stability and continuity of minority education and might have a negative impact on the parents’ choice as to their children education; it does not address in an appropriate manner the problem of financing of the media for national minorities, and so on.

Keywords: *Venice Commission, kin-minority, promotion and protection of rights of persons belonging to national minorities, “collective” rights, individual rights, self-government, ethno-business*

Introduction

The European Commission for Democracy through Law, better known as the “Venice Commission”, adopted, at its 91st plenary session (15-16 June 2012, Venice), its Opinion on the Act on the Rights of Nationalities of Hungary (hereafter referred to as “the Opinion”).¹ The Opinion of

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¹ Opinion on the Act on the Rights of Nationalities of Hungary, adopted by the Venice Commission at its 91st Plenary Session (Venice, 15-16 June 2012), on the basis of comments by Mr Sergio BARTOLE (Substitute Member, Italy), Mr Latif HUSEYNOV (Member, Azerbaijan), Mr Jan VELAERS (Member, Belgium), Opinion no. 671/2012, CDL-AD(2012)011, the official site of the Venice Commission, accessed July 4, 2012, [http://www.venice.coe.int/docs/2012/CDL-AD\(2012\)011-e.pdf](http://www.venice.coe.int/docs/2012/CDL-AD(2012)011-e.pdf).

the Commission was asked, on 1 February 2012, by the President of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe.²

This Act on the Rights on Nationalities (Act no. CLXXIX of 2011)³ (hereafter referred to as “the Act”) was adopted by the Hungarian Parliament on 19 December 2011 following the adoption of the new Hungarian Constitution, which entered in force on 1 January 2012. According to this Constitution, a number of so-called “cardinal acts” were supposed to be passed. The “cardinal law” is similar to the organic law in the Romanian system, as it has to be adopted with a certain qualified majority, that is two-thirds majority of the votes of the Members of Parliament present at the session approving the Act. This new Act replaces the former Hungarian Act on National and Ethnic Minorities of 1993. The 1993 Act was promoting the controversial concept of “collective” rights for minorities, approach which is reflected constantly in the overall policy on the matter of the Hungarian state, and which is also maintained in the new Act. This approach is reflected in the Act by declaratory means (it is mentioned as such), but also by conserving the organization of minorities in the so-called “self-governments” of minorities: the collective rights are supposed to be exercised, on behalf of the minority, by the self-government at national level.⁴ Another interesting aspect of the new Act is the re-denomination of national minorities of Hungary as “nationalities”.

For Romania, this new Act of 2011 is important for several reasons. First, it is relevant as far as the promotion and protection of the rights of persons belonging to the Romanian minority living in Hungary, which, in time, has become less and less numerous, for various motives. The adequate level of promotion and protection of the rights of these persons and the preservation of its cultural identity, including by the means provided by the national domestic legislation of Hungary, are of great relevance. Second, because a comparison between this domestic legislation and the European standards on minority protection – as performed by the Venice Commission in its June Opinion – is necessary to assess if the former is compatible with the latter. Third, because Romania (as the majority of the European doctrine on human rights and International Law) does not consider “collective” rights for minorities as part of the generally accepted standards on minority protection. Therefore, any potential evolutions on the matter must be accordingly treated with due attention. Last but not least, the issue of the legal regime of minorities in Hungary is also an item on the agenda of the Romanian-Hungarian Joint Committee on national minorities, a bilateral body created 15 years ago in order to monitor the situation of the Romanian minority in Hungary and of the Hungarian minority in Romania, as well to assess the needs of our respective kin-minorities and to propose recommendations for each of the two governments and to both of them. This Commission meets annually and is supposed to adopt Protocols of the annual sessions, negotiated by the Commission on the basis of the previously mentioned assessment. During the 15 years of continuous functioning, the two sides have concluded five protocols during seven sessions of debates and the two parties are now in the process of negotiating the sixth.

An evaluation of the way in which both sides put into practice the recommendations from all adopted Protocols shows that Romania has fulfilled more than 65% (25 completed out of 39) of all recommendations addressed to it between 1997 and 2009. As to the Hungarian side, it has completed less than 50% (out of 35 recommendations, 15 are unaccomplished and 18 were partially accomplished); there is still a number of recommendations that are repeated constantly over the years (parliamentary representation, education in Romanian, ensuring adequate financing and personal for the Romanian mass-media, financing the activity of the Romanian Orthodox Episcopacy).

² Paragraph 1 of the Opinion.

³ Act on the Rights of Nationalities of Hungary, CDL-REF(2012)014, (English version), the official site of the Venice Commission, accessed July 4, 2012, [http://www.venice.coe.int/docs/2012/CDL-REF\(2012\)014-e.pdf](http://www.venice.coe.int/docs/2012/CDL-REF(2012)014-e.pdf).

⁴ See article 2 paragraphs 2, 3 of the Act.

The Hungarian Act and the International Standards, as reflected in the Relevant International Conventions and International Law Doctrine

Hungary is a party to the International Covenant on Civil and Political Rights of 1966 (article 27 of this treaty refers to national minorities), the Framework Convention for the Protection of National Minorities of 1995 and the European Charter for Regional or Minority Languages of 1992.

The Framework Convention for the Protection of National Minorities is considered as the most relevant international treaty codifying, at European level, the standards on minority protection. Article 3 paragraph 2 of the Framework Convention provides that “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.”

Also, the Explanatory Report to the Framework Convention mentions, in its paragraph 13, that “The implementation of the principles set out in this Framework Convention shall be done through national legislation and appropriate governmental policies. *It does not imply the recognition of collective rights.* The emphasis is placed on the protection of persons belonging to national minorities, who may exercise their rights individually and in community with others (see Article 3, paragraph 2). In this respect, the framework Convention follows the approach of texts adopted by other international organizations.”⁵ Paragraph 37 highlights that paragraph 2 of article 3 “provides that the rights and freedoms flowing from the principles of the Framework Convention may be exercised individually or in community with others. *It thus recognizes the possibility of joint exercise of those rights and freedoms, which is distinct from the notion of collective rights.*”⁶

It is thus clear that the Framework Convention does not include the concept of collective rights within the standards embodied in the Convention.⁷

The issue of collective rights was also raised in the context of the Opinion of the Venice Commission on the new Constitution of Hungary,⁸ adopted in 2011. In its analysis on article D of the Constitution, the Venice Commission made several comments and expressed certain criticism. Article D has the following content: “Bearing in mind that there is one single Hungarian nation that belongs together, Hungary shall bear responsibility for the fate of Hungarians living beyond borders, and shall facilitate the survival and development of their communities; it shall support their efforts to preserve their Hungarian identity, the assertion of their individual and collective rights, the establishment of their community self-governments, and their prosperity in their native lands, and shall promote their cooperation with each other and with Hungary.”

The Venice Commission considered first⁹ that there is a “very delicate problem of the sovereignty of States” created by the formula “*Hungary shall bear responsibility for the fate of Hungarians living beyond its borders*”, which “might give reason to concerns”, being “a rather wide and not too precise formulation”. The problem identified by the Commission was with the use of the

⁵ Framework Convention for the Protection of National Minorities and Explanatory Report, the official site of the Council of Europe, accessed July 4, 2012, [http://www.coe.int/t/dghl/monitoring/minorities/I_atglance/PDF_H\(1995\)010_FCNM_ExplanReport_en.pdf](http://www.coe.int/t/dghl/monitoring/minorities/I_atglance/PDF_H(1995)010_FCNM_ExplanReport_en.pdf); italics added.

⁶ *Idem.*

⁷ See also Bogdan Aurescu, “Drepturi individuale vs. drepturi colective. Drepturi exercitate individual și drepturi exercitate împreună cu alții”, *Observator cultural* 434 (2008), accessed July 4, 2012, http://www.observatorcultural.ro/Drepturi-individuale-vs.-drepturi-colective*articleID_20210-articles_details.html.

⁸ Opinion on the new Constitution of Hungary, adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011) on the basis of comments by Mr Christoph GRABENWARTER, (Member, Austria), Mr Wolfgang HOFFMANN-RIEM (Member, Germany), Ms Hanna SUCHOCKA (Member, Poland), Mr Kaarlo TUORI (Member, Finland), Mr Jan VELAERS (Member, Belgium), Opinion no. 621 / 2011, CDL-AD(2011)016, the official site of the Venice Commission, accessed July 4, 2012, [http://www.venice.coe.int/docs/2011/CDL-AD\(2011\)016-e.pdf](http://www.venice.coe.int/docs/2011/CDL-AD(2011)016-e.pdf).

⁹ In paragraph 41 of the Opinion on the new Constitution of Hungary.

term “responsibility”, which was found as “unfortunate”, as “it may be interpreted as authorizing the Hungarian authorities to adopt decisions and take action abroad in favor of persons of Hungarian origin being citizens of other states and therefore lead to conflict of competences between Hungarian authorities and authorities of the country concerned.” Then, the Commission drew attention on the fact that article D of the Constitution mentions that instruments for achieving this “responsibility” are “*inter alia* support to the “*establishment of their community self-governments*” or “*the assertion of their individual and collective rights*”.”

These concepts are to be found also in the text of the Act on the Rights of Nationalities of Hungary of 2011, and the analysis on this Act cannot be done adequately without making the connection between the internal and the external dimensions (and instruments) of the action of the Hungarian State for minority protection.

Also, the Commission recalled¹⁰ that according to the existing standards, as included in the Report on the Preferential Treatment of National Minorities by their Kin-State, adopted by the Venice Commission in October 2001, while States may legitimately protect their own citizens during a stay abroad, as indicated in its Report, “responsibility for minority protection lies primarily with the home-States” and that “kin-States also, lay a role in the protection and preservation of their kin-minorities, aiming at ensuring that their genuine linguistic and cultural links remain strong”. It also reminded that the same Report considered that respect for the existing framework of minority protection, consisting of multilateral and bilateral treaties, must be held a priority and that unilateral measures by a State with respect of kin-minorities are only legitimate “if the principles of territorial sovereignty of States, *pacta sunt servanda*, friendly relations amongst States and the respect of human rights and fundamental freedoms, in particular the prohibition of discrimination, are respected”.

As far as the “collective rights” issue is concerned, the Commission mentioned Article 2 of the Framework Convention (to which Hungary is a Contracting Party), in connection with the provisions of Article Q of the new Constitution, which sets forth that “*Hungary shall ensure harmony between international law and Hungarian law in order to fulfill its obligations under international law*”. Thus, the Commission notes that the Explanatory Report to the Framework Convention stresses that the text of the Convention does not accredit the concept of collective rights. Also, the Commission continues: “Nevertheless, it is not up to the Hungarian authorities to decide whether Hungarians leaving in other States shall enjoy collective rights or establish their own self-governments.”¹¹ The Commission expresses its hope¹² that these provisions of the Constitution as well as the subsequent legislation will be applied “in co-operation with the States concerned”, and “not as a basis for extra-territorial decision-making”.

It is thus a clear link, which has to be taken into account, between the concepts promoted by Hungary in its domestic legislation with regard to the national minorities on its territory and the promotion of the same concepts, by Hungary, abroad, with regard to its kin-minority. That is why the assessment of the compatibility of the Hungarian legislation regarding the protection for the minorities living in Hungary is even more relevant.

It is to be noted that during the debates in the plenary session of the Commission of June 2012, following a proposal for amendment of the Opinion by the author of this article in his capacity of substitute member of the Commission, the draft Opinion was amended so as to exclude any interpretation that the Venice Commission endorses the concept of collective rights for national minorities.

¹⁰ In paragraph 42 of the Opinion on the new Constitution of Hungary.

¹¹ In paragraph 43 of the Opinion on the new Constitution of Hungary.

¹² In paragraph 44 of the Opinion on the new Constitution of Hungary.

The Opinion on the Act on the Rights of Nationalities of Hungary. Presentation and Analysis

Despite claims on the contrary by the Hungarian authorities, the Opinion contains a rather important number of critic remarks and recommendations on the Act.

One remark made by the Commission refers to the fact that the Act, as a “cardinal law”, has a narrow possibility to be revised, as cardinal laws require a two third majority to be amended, “with the ensuing risk for possible future reforms to be stuck in long-lasting political conflicts and undue pressure and costs for society”.¹³

The Venice Commission also noted¹⁴ that the overwhelming majority of the transitional provisions contained in Chapter XII of the Act 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. In the view of the Commission, this procedure complicates the reading and understanding of the law. The Commission considered that these 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.

The Commission also considered¹⁵ that the Act contains “too specific and detailed provisions, of a merely technical and procedural nature, which could have been set out by the ordinary legislation”. The Opinion claims that “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. In addition, despite their very detailed nature, important provisions of the law lack clarity and their inter-relation is sometimes difficult to understand.” The Opinion also notes that “different dates are set up for the entry into force of different provisions of the Act, which “adds to its length and complexity and may make its interpretation and application difficult.”¹⁶

Another issue tackled by the Opinion refers to the changed terminology used by the Act in respect to national minorities: if the 1993 Act used the term “national minority”, the 2011 Act employs the formula “nationality”. The Hungarian authorities did not provide for a clear explanation why this modification was performed. It is not just a formal change. One can only infer that this change is connected, again, with the approach of Hungary in relation with its kin-minority abroad.

Indeed, for Hungary, as it was stated in its new Constitution, there exists a constitutional “responsibility” for the Hungarian minorities living in neighboring countries (see article D of the new Constitution, cited above). At the same time, it was a constant approach in the foreign policy of Hungary that its kin-minorities living abroad form part of the “Hungarian nation as a whole”: this approach was at the essence of the controversial Law on Hungarians living in neighboring countries of 2001.¹⁷ This wording was included in the Preamble of that Law, and it was criticized for that

¹³ In paragraph 25 of the Opinion on the Act.

¹⁴ In paragraph 26 of the Opinion on the Act.

¹⁵ In paragraph 27 of the Opinion on the Act.

¹⁶ In paragraph 28 of the Opinion on the Act.

¹⁷ See, for details, Adrian Nastase, Raluca Miga Bestelie, Bogdan Aureescu, Irina Donciu, *Protecting Minorities in the Future Europe – between Political Interest and International Law* (Bucharest: R.A. Monitorul Oficial, 2002); Bogdan Aureescu, “Bilateral Agreements as a Means of Solving Minority Issues: The Case of the Hungarian Status Law”, *European Yearbook of Minority Issues*, Martinus Nijhoff Publishers, European Academy of Bolzano, Vol. 3 (2003-2004): 509-530; Bogdan Aureescu, ed., *Kin-State Involvement in Minority Protection. Lessons Learned*, International Law Section of ADIRI and Venice Commission (Bucharest: R. A. Monitorul Oficial, 2005); Bogdan Aureescu, “Cultural Nation versus Civic Nation: Which Concept for the Future Europe? A Critical Analysis of Recommendation No. 1735/2006 of the Parliamentary Assembly of the Council of Europe on The Concept of Nation”, *European Yearbook of Minority Issues*, Martinus Nijhoff Publishers, European Academy of Bolzano, Vol. 5 (2005-2006): 147-159.

reason by various European bodies, including by the European Commission. This concept of the “big cultural/ethnic nation” means that the Hungarian nation is formed by the Hungarian ethnic majority of Hungary, as well as, by extension on the territories of the neighboring States, by the Hungarian communities living there. As a consequence and as a logic step in this conceptual line of thinking, the Hungarian communities in neighboring countries are not “minorities” (in relation to the ethnic majority of the home-State), but communities which “belong” to the Hungarian nation, parts of it. So, they are “nationalities” – components of the Hungarian (bigger) nation. That is why it appears logic for the minorities in Hungary not to be seen as such, but as “nationalities”, in order to justify logically the official approach towards the Hungarian minorities abroad. It is the same logic of parallelism that can be noticed as far as the organization of national minorities in Hungary: in order to justify the claim for collective rights and cultural and territorial autonomy on ethnic basis for its kin-minority abroad, Hungary introduced since 1993 the concept of self-governments for the national minorities of Hungary, which are deemed to implement the “collective” rights of these communities in Hungary.

The Venice Commission did not elaborate on the issue. The opinion only remarked that there is no definition of national minority conventionally agreed at international level: the Framework Convention did not include such a definition, so the matter of terminology as well as the definition at domestic level is a matter of discretion of the respective State. The opinion mentions that “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.”, but this margin should be “in accordance with general principles of international law and the fundamental principles set out in art. 3 FCNM.” The Commission underlines that the margin of appreciation is “however not unlimited, so that the implementation of the Framework Convention is not a source of arbitrary or unjustified distinctions.”¹⁸

As far as the definition included in the Law is concerned (“*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*”, set forth by article 1 paragraph 1 of the Act), the Commission criticized certain elements: the 100 years criterion, which in the view of the Commission excludes the so-called “new minorities”, the strict link to the territory, which the Commission considers as problematic as far as Roma are concerned, and the citizenship requirement (which is not obvious, but results from the Constitution and other provisions of the Act).¹⁹

This criticism is the expression of a certain trend in the doctrine on the matter to extend as much as possible the minority protection to other groups than the traditional minorities. If the observation related to the difficulties that Roma might face, if the link to the territory is strictly followed, is founded, and the 100 years criterion (or similar provisions in other legislations) is generally linked to financial restrictions (which do not allow in practice for the application of all facilities to every minority group), the one related to citizenship is, to my view, subject to a more nuanced approach. The Opinion refers to the conclusions of another important study of the Commission, of 2006, that is the Report on non-citizens and minority rights.²⁰

¹⁸ In paragraph 31 of the Opinion on the Act.

¹⁹ In paragraphs 32-35 of the Opinion on the Act.

²⁰ Report on non-citizens and minority rights adopted by the Venice Commission at its 69th plenary session (Venice, 15-16 December 2006), on the basis of comments by Mr Gudmundur ALFREDSSON (Expert, Iceland), Mr Bogdan AURESCU (Substitute Member, Romania), Mr Sergio BARTOLE (Substitute Member, Italy), Mr Pieter van DIJK (Member, the Netherlands), Ms Mirjana LAZAROVA TRAJKOVSKA (Member, “The former Yugoslav

The Commission reminds²¹ that according to this Report, it is recommended 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”. This is not entirely accurate. The first version of the 2006 Report, to which the author of this paper was one of the co-rapporteurs, intended to recommend to States to simply remove the citizenship criterion from the definition of national minority adopted at domestic level, but at the end, as a result of the debates inside the Commission, concluded that “where necessary”, to extend the protection to non-citizens. So, it is not an automatic conclusion that citizenship should be deleted from the conditions of a definition of a national minority.²² As a matter of fact, the citizenship of the home-State provides for the best protection for a person belonging to a national minority, as it grants access to political rights such as to vote and to be elected, thus ensuring participation to decision-making.

Further, the Commission welcomes that the Act provides for a certain procedure for new ethnic groups to be included in the scope of the Act, beyond the 13 national minorities recognized as such by the Act.²³

Another matter examined by the Commission was about the accurate collection of data regarding the ethnic making-up of the population of Hungary. In this regard, the Commission stresses in the Opinion the need for the census to be organized in such a manner so as to ensure that the data collected are correct. In paragraph 43 of the Opinion, the Commission noted that the choice – made by the Act – to use the data collected in the census as a basis for elections for the self-governments “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.” The Commission also recalled, in paragraph 44, “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.” But the Commission also recommended²⁴ for other sources to be used as well: 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

Republic of Macedonia”), Mr Giorgio MALINVERNI (Member, Switzerland), Mr Franz MATSCHER (Expert, Austria), in consultation with the Advisory Committee on the Framework Convention for the Protection of National Minorities, the Committee of Experts of the European Charter for Regional or Minority Languages, the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, the OSCE High Commissioner on National Minorities, the Office of the UN High Commissioner for Human Rights, Study no. 294/2004, CDL-AD(2007)001, the official site of the Venice Commission, accessed July 7, 2012, [http://www.venice.coe.int/docs/2007/CDL-AD\(2007\)001-e.pdf](http://www.venice.coe.int/docs/2007/CDL-AD(2007)001-e.pdf).

²¹ In paragraph 36 of the Opinion on the Act.

²² See Bogdan Aurescu, “The 2006 Venice Commission Report on Non-citizens and Minority Rights – Presentation and Assessment”, *Helsinki Monitor. Security and Human Rights*, Martinus Nijhoff Publishers, Vol. 18, No.2 (2007): 150-163.

²³ In paragraphs 38 and 39 of the Opinion on the Act.

²⁴ In paragraph 45 of the Opinion on the Act.

(held every ten years).” Indeed, the last census organized in Hungary in 2011 has raised certain concerns as far as the accurate manner of collecting ethnic data.

This issue is important, because, as already mentioned above, according to the Act, the ethnic data collected in the census are relevant for creating self-governments of national minorities: “local self-government elections can only be held in settlements where a nationality has a genuine presence.” In practice, the issue is crucial, as the former legal framework of Hungary has generated the phenomenon of “ethno-business” – the formation of minority self-governments by persons who have nothing to do with the respective minority, which greatly affected the situation of the Romanian minority. The situation was prompted by the fact that the previous legislation in force did not include any provision to make sure that the electors or the candidates for self-governments of a certain national minority do belong to the respective minority. Such a “filtering” element may be the certification of minority language proficiency/knowledge as mother tongue.

The 2011 Act introduces such a provision: “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).”²⁵ But the Commission noticed that the Act does not include any concrete specification on who and how shall verify whether or not this last requirement is fulfilled. Following a proposal by the author of this paper, as substitute member of the Commission, put forward in the June 2012 plenary session, the Opinion included a specific recommendation to this purpose, in paragraph 48: “In order to guarantee legal certainty in this respect, the Act should contain some specific rules on the certification of the compliance with this requirement.”

Regarding the overall regime of self-governments in the Act, the Commission noticed, in paragraph 50, the too detailed regulation of many procedural aspects: “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 organizational and/or procedural rules might be set out in the relevant internal regulations. More generally, the Commission is concerned that such a detailed and not always clear regulation may negatively affect the autonomy of nationality self-governments and lead to undue restriction of the free exercise by the persons belonging to nationalities of their rights.” Indeed, even if they are supposed to be autonomous, the self-governments are – according to the Act – to be supervised by the government: “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.”²⁶

As far as the issue of education, as set forth in the Act, the Commission welcomed in general the provisions of the Act, but noticed, in paragraph 59 of the Opinion, that “the 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

²⁵ In paragraph 48 of the Opinion on the Act (italics added).

²⁶ See paragraph 52 of the Opinion on the Act.

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 Commission expressed the opinion that 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).”

Starting from the regime provided for in the Act, according to which the “competent authority” may be either the public authority or the self-government, which have the right to establish and maintain institutions of public education and/or to take over already established such institutions (article 24 (1) of the Act), the Opinion mentions the fact that 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.”²⁷

Further, the Commission criticized the degree of discretion introduced by article 160 of the Act, according to which education in mother tongue and teaching of the mother tongue are subject, in addition to the already mentioned conditions, to the local opportunities and needs. So, the Opinion asks, in paragraph 62, for “increased clarity with regard to the authority entitled to decide and (to) the participation of nationality self-governments in that decision.” The same clarity is required as to the crucial issue of the funding of education for national minorities (article 26, article 30 of the Act), 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 laws.”²⁸

The next issue examined by the Opinion was the cultural development of national minorities and especially their access to media. The Commission was concerned with the lack of clarity of the provisions regarding the transfer to self-governments of the operating rights of cultural institutions that fulfill 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”.²⁹

But it was also particularly concerned with the problem of financing of the media for national minorities. In paragraph 66 of the Opinion, the Commissions found “*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.*”³⁰

Indeed, it is an important issue including for the Romanian minority in Hungary: last year, allegedly due to financial constraints, the Romanian Studio of the Hungarian Radio and Television Society has been downsized, although in the 2009 Protocol of the Joint Committee on national minorities the Hungarian side has acknowledge the clear need for more positions to the Romanian radio.

²⁷ In paragraph 60 of the Opinion on the Act.

²⁸ Paragraph 62 of the Opinion on the Act.

²⁹ Paragraph 65 of the Opinion on the Act.

³⁰ Italics added.

Furthermore, the Commission endorsed and reiterated the views of the Advisory Committee of the Framework Convention which expressed concern that “minorities’ programmes often still are broadcasted at off-peak times when few people are able to listen or to watch them”.³¹ The Commission considered important that the Hungarian 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.³²

As far as the language rights provided for by the Act, the Opinion reiterates the concerns expressed already as 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.”³³ Indeed, the Act uses as a reference the ratio registered in the census of a national minority within the local population in order to enjoy language 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.”³⁴ Or, during the 2011 census, as acknowledged by the Commission in the same paragraph 72, there were “insufficient information available, when the census was conducted, on the importance and relevance of the ethnic data for the implementation of minority protection measures” and this situation raised concerns among the national minorities.

The Commission also tackled the problem of the use of the minority language within the bodies of the self-governments: the current practice shows a trend of almost exclusive use of Hungarian, to the detriment of the minority language (and this is the case also as far as the Romanian self-governments). The Commission reiterated³⁵ that “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”. It took note, in this sense, in the same paragraph 73, “that the law provides for the use of the mother tongue in the boards of representatives of local municipalities and in the minutes and decisions of these boards alongside the Hungarian language (article 5 § (4) and (5)).” The Commission also stressed in this respect that financial resources should be provided to ensure translation, when it is required by the law.

Paragraph 74 of the Opinion refers to the important issue of ensuring representation of national minorities in the Hungarian Parliament. The same session of June 2012 of the Commission also adopted an Opinion³⁶ on Act CCIII of 2011 on the elections of Members of Parliament of Hungary, adopted in December 2011³⁷. This piece of legislation sets forth the parliamentary

³¹ 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, accessed July 7, 2012, http://www.coe.int/t/dghl/monitoring/minorities/3_fcnmdocs/PDF_3rd_OP_Hungary_en.pdf.

³² Paragraph 68 of the Opinion on the Act.

³³ Paragraph 71 of the Opinion on the Act.

³⁴ Paragraph 72 of the Opinion on the Act.

³⁵ In paragraph 73 of the Opinion on the Act.

³⁶ Joint Venice Commission - OSCE/ODIHR Opinion on the Act CCIII on the Elections of Members of Parliament of Hungary, adopted by the Council for Democratic Elections at its 41st meeting (Venice, 14 June 2012) and the Venice Commission at its 91st Plenary Session (Venice, 15-16 June 2012), on the basis of comments by Mr Ugo MIFSUD BONNICI (Member, Malta), Mr Ángel SÁNCHEZ NAVARRO (Substitute Member, Spain), Mr Kåre VOLLAN (Expert, Norway), Mr Denis PETIT (Expert, OSCE/ODIHR), Opinion No. 662 / 2012, CDL-AD(2012)012, accessed July 7, 2012, [http://www.venice.coe.int/docs/2012/CDL-AD\(2012\)012-e.pdf](http://www.venice.coe.int/docs/2012/CDL-AD(2012)012-e.pdf).

³⁷ Act CCIII on the Elections of Members of Parliament of Hungary, CDL-REF(2012)003, accessed July 7, 2012, [http://www.venice.coe.int/docs/2012/CDL-REF\(2012\)003-e.pdf](http://www.venice.coe.int/docs/2012/CDL-REF(2012)003-e.pdf).

representation of national minorities of Hungary through a system of “preferential mandates” and “spokespersons” (for those national minorities that failed to meet the conditions for getting a preferential mandate). This system is supposed to be applied for the first time during the 2014 general parliamentary elections.

The issue of parliamentary representation of the Romanian minority of Hungary was constantly raised in the framework of the Romanian-Hungarian Joint Committee on national minorities.

In this context, one has to remind the solution chosen by the Romanian legislators to ensure the parliamentary representation of national minorities. In Romania, all recognized national minorities (20) have one representative, with full powers of vote, in the Chamber of Deputies, elected through a special procedure. If the national minorities have a larger number of persons, such as the Hungarian minority, they can be elected through the normal procedure and can form a separate Parliamentary Group. In the current legislature (2008-2012), there are 31 members of Parliament (9 senators and 22 deputies) representing the Hungarian minority and another 18 deputies representing the other national minorities.

But the new piece of legislation of 2011 on the elections of Members of Parliament of Hungary, adopted in December 2011, does not provide for an equal framework for all minorities, as is the case in Romania, but favours only larger minorities.

The new Hungarian legislation states that a deputy of the minority can be elected if it has obtained one quarter of the votes obtained by a normal deputy. In case this does not happen, that minority will be represented by a “spokesperson”, which will not have the right to vote in the Parliament. For the Romanian minority, which is a small minority, to be fully represented in the Parliament, the general presence at the voting stands will have to be extremely reduced and, at the same time, the entire minority must vote. A simulation based on the turnout in the 2010 Hungarian elections shows that the Romanian minority deputy will have to get more than 14.000 votes to be elected as a member with full rights. Given that our minority has approximately less than 8000 member in total, there is basically no possibility for it to obtain a full mandate.

I believe that this situation of discrimination between smaller and larger national minorities of Hungary as far as the rights of the minority representatives in the Hungarian parliament should be eliminated, by providing the same voting rights for both representatives with preferential mandate, and spokespersons. In the case of Romania, which may be considered as a European model in this respect, full participation of minorities in domestic political decision-making increased mutual confidence between majority and minorities, and transformed the organizations of national minorities into active participants in building the democratic system in Romania.

Another issue discussed in the Opinion referred to the fact that the new Act provides for a deputy ombudsman (commissioner for fundamental rights) to be in charge with national minorities. In the previous constitutional framework, there was a specialized ombudsman for the protection of minority rights. So, the Commission states in paragraph 77 that “the abolition of the position of an independent, separate and autonomous minority ombudsperson has raised some concerns” and that “it is however important that the reorganization 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.”

The Conclusions of the Opinion also acknowledge, besides the positive aspects of the Act, the fact that “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 the act to Hungary’s nationalities. In particular, the overly-detailed regulation of nationality self-governments’ operation and supervision, as well as the

sometimes unclear provisions regulating specific areas, may lead to undue restriction of the free exercise by the minorities of their rights and by nationality self-governments of their competences.” In paragraph 85, the Opinion also mentions that 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.”

Conclusions

The Act on the Rights of Nationalities of Hungary of 2011, as assessed by the Venice Commission in its Opinion of June 2012, has both positive, and problematic provisions.

Among the latter, *inter alia*, the fact that it is a “cardinal” law, thus quite difficult to be amended, it sometimes includes an excessively detailed regulation, it changes the terminology from “national minority” to “nationality”, with important consequences to the manner of projecting the Hungarian interests as far as the Hungarian minorities abroad, it includes a narrow definition of the “nationality”, thus excluding the new minorities and creating some difficulties for the Roma, who are not (by tradition) strictly linked to territory, it does not include sufficient guarantees as to the accuracy of ethnic data collection, especially by censuses, it does not provide for concrete measures to ensure the verification of the mother tongue knowledge by minority electors and candidates for self-governments, the education regime has a degree of uncertainty with regard to the stability and continuity of minority education and might have a negative impact on the parents’ choice as to their children education, it does not address in an appropriate manner the problem of financing of the media for national minorities, and so on.

All these issues are to be seen in connection with other pieces of legislation of Hungary, like the Act on elections, which creates a situation of discrimination between smaller and larger national minorities of Hungary as far as the rights of the minority representatives in the Hungarian parliament.

Of course, these shortcomings should be addressed by further amending the Act, as keeping the Act as such might have consequences on the adequate protection of the rights of persons belonging to the 13 national minorities recognized in Hungary, among which the Romanian minority. Romania should continue to make good use of the bilateral mechanisms in place, especially the Joint Committee on national minorities and its Protocols, in order to promote further improvements of the legal framework on national minorities in Hungary, as well as a fair implementation of it as far as the Romanian minority is concerned. In doing so, a point of reference will be of course the degree of protection granted to the minorities of Romania, including to the Hungarian minority, whose participation in the society and decision-making in the political life was and will be appreciated.

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