The official language and the rights of the persons belonging to national minorities in the area of education

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Summary

The study analyzes the characteristics of the official language and the compulsory character of acquiring Romanian. Given the fact that new regulations appeared in the last year in the area of education, the research focuses especially on the special measures in the field of education.

In terms of convenience, the study notices the tendency to move away from the guidelines emphasized in the Hague Recommendations from 1996, which suggest a gradual increase, starting with the last grades of primary education and gradually throughout secondary education, of the number of subjects taught in the official language. Given this reason, the author proposes that the current system that allows parents the choice of one of the two mainly unilingual models could become more flexible by introducing the possibility to study also other subjects in the second language.

Finally, the study outlines the substantial differences regarding the concrete possibilities to use the special disposition in the area of education between the members of Hungarian or of Roma minorities.

Key words:

national minorities, linguistic rights, official language, special measures, education

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The entry into force, this year, of the new Law of education has introduced, along with the essential changes in the Romanian educational system, some changes in the area of education for the persons belonging to national minorities. As the best known of these is the transition from teaching history and geography in Romanian to teaching these subjects in the native language - which could mean a significant reduction in the number of hours of practice of the Romanian language - it arises the issue of the manner and, especially, the degree to which the obligation to acquire the official language will be insured, in the case of the students studying in one of the languages of national minorities.

We begin by analyzing the fundamental principles applicable to this field, after which, we express some opinions on the definition and the compulsory character of acquiring the Romanian language, and then we focus on the linguistic and participation rights provided by the new law of education.

1). The fundamental principles applicable to the linguistic rights of persons belonging to national minorities

   a) From a constitutional perspective, we notice that the State recognizes and guarantees to the persons belonging to national minorities the right to preserve, develop and express their ethnic, cultural, linguistic and religious identity, introducing the restriction set by the ECHR practice, of respecting the rights of others. The importance of regulating the right to identity in the cited form is, in our opinion, in determining the purpose and limits in light of which will be interpreted all present and future laws on national minorities. Thus, the principle of equality, corroborated with that of preserving and promoting national identity, legitimate the special, positive measures, which appear to exceed the non-discrimination principle, measures that led to the introduction of the concept of substantial equality.

8 The decision of the National Council for Combating Discrimination on eliminating the position of local expert on Roma issues from July 2nd, 2009, petition no. 4506/29.04.09, in The New Review of Human Rights no. 1 / 2010, p. 43
From another point of view, the provision above describes the identity of national minorities as being ethnic, cultural, linguistic and religious, thereby apparently assimilating the national minority with the ethnic, cultural, linguistic and/or religious minority, in the spirit of the international documents analyzed in the first chapter.

Regarding the used concepts, the Romanian Constituent Assembly includes the minority rights within the category of human rights, as they are individual rights.\(^9\)

b) Next to the principle of the national and unitary state, the Constitution affirms the principle of equality and non-discrimination on any criteria, among citizens. Consequently, "(1) The State recognizes and guarantees the right of persons belonging to national minorities to preserve, develop and express their ethnic, cultural, linguistic and religious identity. (2) The protection measures taken by the state for the preservation, development and expression of the identity of persons belonging to national minorities must be in accordance with the principles of equality and non-discrimination in relation to the other Romanian citizens." (Art. 6). In order to achieve an effective equality, positive measures can be taken. The principle of equality and non-discrimination becomes both the purpose and the limit of protection for minority people.

These provisions must be corroborated with those in art. 11 and 20 of the Constitution, through which the regulations of international human rights law enter into the internal law. These regulations take precedence over the internal laws; even the Constitution must be interpreted in their spirit. Taking this into consideration, we can say that the issue of minorities in the Romanian law should be treated as an aspect of human rights\(^10\), as in the majority of European states. Given this context, we notice the correlation of our internal provisions, including the constitutional ones, on education in the native languages of the minorities and the study of these languages, with both international provisions having mandatory character - art.27 of the International Covenant on Civil and Political Rights (1966), Article 14 and Protocol 12 to the European Convention on Human Rights, the Convention on the Elimination of All Forms of Racial


Discrimination (1965), the Framework Convention for the Protection of National Minorities (1995), the European Charter for Regional or Minority Languages (1992), the bilateral treaties concluded by Romania with countries such as Germany, Ukraine, Hungary\(^{11}\) - and with the soft law – the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992), the Document of the Copenhagen Meeting of the Conference for Security and Co-operation in Europe (CSCE) in 1990 or the recommendations of the Council of Europe’s institutions etc.\(^{12}\)

c) Another relevant principle for understanding the internal regulations on national minorities is that according to which in Romania the official language is Romanian (Article 13). Although the term ”official language” is not explained, at normative level, the phrase is not meaningless as long as, by way of a systematic and teleological interpretation, the meaning of this term can be clarified, or at least interpreted.

d) In corroboration with the already mentioned principles, must be interpreted the constitutional provision of Art. 32 para. (3) which states that ”the right of persons belonging to national minorities to learn their mother tongue and be educated in this language are guaranteed.” This provision covers, from the linguistic rights, only those aspects concerned with education, without any indication of the use of mother tongue in administration or in the justice system. In the latter field, we notice that the relevant constitutional provision, Art. 23 para. (8), refers to a restrictive use of another language in the procedural framework, only if the party does not understand the official language.\(^{13}\)

2). From this perspective, we questioned the meaning of the term *official language* and also of the content of the obligation to acquire this language.

a) The term *official language* appears in the Constitution of Romania, in the Romanian laws, such as the former Law of Education 84/1995, the current Law of National Education, 1/2011, in the Law on local public administration 215/2001, and also in the international

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\(^{11}\) Ion Diaconu, *The Minorities in Public International Law*, CH Beck Publishing House, Bucharest, 2009, p.205

\(^{12}\) For details see M.R. Prisacariu, *op.cit.*, p. 135.

regulations such as the Framework Convention for the Protection of National Minorities of 1995 (art.14). In this context, the content of the official character of a language deserves to be studied from a juridical point of view.

From a sociological point of view, it has been considered that the official language is, usually, that:
- Of oral communication used in the administration offices, discussing official business (meetings, audiences);
- Which is used in writing between the various levels and branches of the administration;
- In which official documents that have juridical and administrative value are issued;
- In which the laws and other regulations are drafted in the original;
- In which different forms having administrative-legal value are printed (e.g. Tax statements);
- In which the various documents under private signature can become evidence in court.

From a juridical point of view, these realities may translate into rights and obligations or regulations, with hypotheses, dispositions and sanctions.

As for the written language, the rule is that, in order to produce juridical effects, the documents must be written in the official language, whether they originate from private or public persons, contain individual or normative acts, adopted by central or local authorities.

As it is noticed, generally, the active subjects of the obligation to draw up these documents in Romanian are the public authorities. If it is sought to obtain legal effect through documents under private signature or originating from the authorities of other states, the obligation to draw up or translate these documents in the official language rests with private interested person, whether we refer to natural or legal persons.

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For failing to observe the obligation of writing and publishing normative acts in Romanian, the sanction is the inexistence of those acts, unlike the case of failing to observe the obligation of notifying the existence of these acts also in the language of the national minority\(^\text{15}\), in which case the administrative sanction is a fine or warning.

For individual acts issued by the authorities, the possible sanction for not writing them in the official language is, in our opinion, the absolute nullity, without impeding the private person's right to request an official translation into the native language\(^\text{16}\).

The private documents written in other languages will not produce legal effects, in the absence of their authentic translation into the official language. The obligation of translation rests with the petitioner, except when the documents are used in a criminal trial, to determine the guilt of the defendant, in which case the translation can be provided by the Ministry of Justice. An exception to this rule is represented by the petition addressed to the authorities in the administrative-territorial units in which the national minorities represent at least 20% of the population. In these units, the petitions written in the native language determine the correlative obligation of the authorities to respond to the request within the legal term, in Romanian or, upon request, in the language of the petitioner.

The same rule, of the use of the official language, applies also to public oral communication. The exceptions are, in this case, the special measures for promoting the native language in administration that we have detailed elsewhere\(^\text{17}\). The documents that are designed to preconstitute evidence in proof of compliance with legal procedures that are carried out orally, are generally also written in the official language.

In conclusion, the official character of the Romanian language is reflected, as a rule, in the use of this language, both in

\(^{15}\) We refer to the normative acts adopted by the local authorities in the administrative-territorial units in which the persons belonging to national minorities represent at least 20% of the population.

\(^{16}\) This right is recognized for private persons in the territorial-administrative units in which the persons belonging to national minorities represent at least 20% of the population, also.

\(^{17}\) M.R. Prisacariu, \textit{op.\,cit.}, p.133.
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writing and orally, in the public activity, administration, education, justice system, culture etc. With an exceptional character, it is permitted by law the use of the mother tongue either on a territorial basis, or on a personal criterion.

b) The obligation of learning, as a means, and of acquiring the official language, as an end, is provided by the Law of national education 1/2011, this norm being taken almost without changes from the Law of education 84/1995. But, as noted in the Council of Europe, the knowledge and learning of a language other than the mother tongue is a concept that can involve varying degrees of performance in communication in different situations: listening, reading, conversation, speech or writing. The Common European Framework of Reference for Languages appeared just as a consequence of the need to clarify the notion of knowledge of a language different from the mother tongue. As the dictionary meaning of the term acquirement indicates a thorough knowledge, similar to that of the mother tongue, unlike the more vague term knowledge, which includes knowledge at a minimal level, we believe that the obligation of acquiring the official language involves the ability to prove knowledge of Romanian language at least at B1 level in all the above listed situations.

The linguistic rights of the persons belonging to national minorities represent, from the perspective of human rights, special measures to ensure the effective equality between the Romanian citizens, native speakers of this language, and those who are not native speakers, ensuring the protection and promotion of the specific identity of the latter, both at a strict linguistic level, and on a larger scale, the cultural scale.

Usually, the assembly of special measures forms the preferential treatment of persons belonging to national minorities.

The notion of positive discrimination was initially used to define the measures taken to ensure the effective equality of persons belonging to those national minorities affected for a long period. It indicates that the official language is treated as a foreign language.

18 Although the Common European Framework of Reference for Languages is considering the foreign languages, and the official language can not be identified with a foreign one, we believe that, at least as a first reference system, the proposed grid could be used to assess in a unitary manner the acquirement of Romanian language by students who learn in a language of the national minorities.
by constant discrimination, with generalized effects at the level of the whole group. In the last decade the use of this phrase was dropped in favor of those of specific measures or preferential treatment because, unlike the positive discrimination that involves providing an automatic and absolute preference to the members of the minority group, the other two aim to ensure the full and effective equality, allowing the assessment to be made specifically, on a case by case basis.\(^\text{19}\)

The special measures are sometimes also called affirmative measures because they involve the responsibility of the state, in addition to the obligation to refrain from any discriminatory action, also the obligations to act, to regulate and enforce these measures.

Traditionally, special measures take into consideration the effective participation of the national minorities in public decisions, aspect analyzed on a different occasion \(^\text{20}\), or providing specific rights of linguistic nature.

These specific rights fall within the category of human rights, given their purpose, that of ensuring the full and effective equality, as opposed to formal or legal equality - which is done by applying the non-discrimination principle. Therefore, once regulated, the public authorities can not cease their application citing the lack of funds, as such a measure could be considered discriminatory.\(^\text{21}\)

The linguistic rights include, in the prevailing conception, both the learning of and in the native language, that is the right to education, and also the rights that can be subsumed to the notion of using mother tongue in public, that is in the relations of the members of the national

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21 See the decision of the National Council for Combating Discrimination on eliminating the position of local expert on Roma issues from July 2\(^\text{nd}\), 2009, petition no. 4506/29.04.09, in *The New Review of Human Rights* no. 1 / 2010, p. 43
minorities with the public authorities, in the broadest sense. In this regard, the linguistic rights can be considered exceptions to the rule of only using the official language in public life. For this reason, the sociological research cited above suggests the terminology limited officiality for those languages that, given the demand, the substantial number and the population density of the speakers, can make use of specific legal provisions.

3) Given the fact that new regulations appeared in the last year in the area of education, we will focus especially on the special measures in the field of education. They reside in the new Law of national education which takes over, with significant enough changes, the provisions of the old law. These changes concern both the education curriculum and the management of education, which is why we will analyze both aspects, after which we will highlight briefly the situation of the Romani language.

The new law of education takes over and interprets, for the regulated field, the constitutional principles, adding to the guarantee of cultural identity, the intercultural dialogue, or bringing together the principle of assuming and promoting national identity and that of recognition and guarantee of the right to preserve the ethnic, cultural, linguistic and religious identity, other than the Romanian one. These principles are also supplemented by that of social inclusion.

a) To assess the specific measures of the educational curriculum, we will consider the Hague Recommendations adopted in 1996 by the group of experts convened by the Foundation on Inter-Ethnic Relations at the initiative of the High Commissioner on National Minorities of the OSCE.

In regard of "the minorities' education at primary and secondary level", the recommendation is that education at preschool and primary level to be held in the mother tongue, with the introduction in elementary school of the official language as a subject of study taught by bilingual teachers and with the possibility of gradual introduction, in the 3rd and 4th grades, of the teaching of some non-theoretical subjects in the official language, at the request of parents.

For the secondary level, a substantial part of the curriculum should be taught in the native language, the official language being a distinct subject of study, taught by bilingual teachers. During the

8 years of secondary education, the number of subjects taught in the official language should be gradually increased.

The curriculum should be organized so that it ensures the students the right to maintain their specific identity, but also the right to integrate and participate in the wider society, beyond the place of residence, allowing them to practice their profession both in the native and the official language.

Correlatively, it is recommended to guide the students belonging to the majority towards an intercultural education, by becoming close to the language, culture and history of the minorities they come in contact with.

Taking into account all of the above and the old regulation, we notice that in Romania it is maintained, in the case of the education for the national minorities, the alternative system: either education in the language of the minority or education in Romanian, with the possibility of teaching some subjects in the mother tongue.

When referring to the education in the mother tongue, the changes brought by the new law in the education curriculum refers to the restriction of the number of subjects taught in Romanian with corresponding increase of those taught in the native language. Thus, while the History of Romanians and the Geography of Romania are to be taught, starting next academic year, in the native language, the insurance of acquiring the Romanian language by the students studying in the mother tongue, lies exclusively with the Romanian language and literature teacher, who will teach after special syllabuses and textbooks, at both primary and secondary level, fact which approaches the Romanian language to a foreign language, as method of teaching.

Taking into consideration the fact that the adoption of such a provision raises questions about the constitutionality and the convenience of this action, we dare to express an opinion.

If the issue of the convenience, although very important from an educational, administrative and political point of view, could go beyond the framework of a strictly juridical debate, the issue of

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23 According to the old law, art. 120, Romanian was taught using special syllabuses and textbooks only at primary level, at secondary level, the teaching of Romanian being done using identical textbooks.
constitutionality can not be avoided. In this regard, we express, first, our opinion that teaching history and geography in the native language does not directly conflict any constitutional requirement. But, as far as we are allowed a teleological interpretation of the constitutional norm regarding the character of official language of Romanian, corroborated with the principle of equality of all citizens, we believe that, from such a perspective, the constitutionality of the new provision might be analyzed. As the regulation which states the obligation to acquire the Romanian language has legal and not constitutional character, we question whether the stating by Constitution of the official character of a language involves, in addition to its recognition as authorized framework of communication in the public life, the obligation to be acquired by all citizens. Only in the case of an affirmative answer, would we logically question whether the study of the Romanian language as a compulsory subject is sufficient to ensure its acquirement by all citizens. Also from a constitutional point of view, and taking into consideration the fact that the principle of equality is a constitutional principle, whose content has also been extended by means of interpretation to the equality of chances, it remains to be clarified to what extent the new provision provides or, on the contrary, affects the equality of chances of the Romanian citizens belonging to the national minorities to find, for example, employment beyond the place of residence, to join the wider society.

In terms of convenience, we notice the tendency to move away from the guidelines emphasized in the Hague Recommendations, which suggest a gradual increase, starting with the last grades of primary education and gradually throughout secondary education, of the number of subjects taught in the official language.

Given this reason, we believe that the current system that allows parents the choice of one of the two mainly unilingual models: either education only in Romanian with the study of the mother tongue and the history and traditions of the minority, or only that in the native language with the study of Romanian as a distinct subject, could become more flexible by introducing the possibility to study also other subjects in the second language. It could start, in the spirit of the Hague Recommendations, in the 2nd, 3rd or 4th grades, with the study in the second language of non-theoretical subjects such as musical education, physical education, civic education, it could continue in secondary
education and especially at high school level with the expansion of the possibilities of choice, depending on the school profile, allowing the students’ fluent communication in both languages. Moreover, the new law envisages the development of some syllabuses and methodologies adapted to the national minorities, in the area of musical education.24

Another change brought on by the new law is that of testing the knowledge of Romanian language and literature based on some special syllabuses, not only at primary education level, as stated in the old regulation, but also at secondary education level (secondary school and high school).

In this context, it is worth noting that, previously, the assessment of Romanian language at the capacity and baccalaureate examinations was carried out following a common scale, unique at national level. Given the fact that there are students who learn in schools with native language teaching, and who learn Romanian language based on different syllabuses or textbooks, the assessment based on identical scales was considered incorrect by the students and their families. Basically, applying a scale of formal equality, given that students from schools with native language teaching were not in a comparable position to those from schools with teaching in Romanian, was declared by the National Council for Combating Discrimination a measure that creates an unjust disadvantage to these students, violating the principle of equality understood as substantial, real, effective. Based on this fact, the National Council for Combating Discrimination considered that "the students attending schools with teaching in the mother tongue of the national minorities are disadvantaged when taking the capacity examination and the baccalaureate examination compared with their colleagues attending schools with teaching in Romanian" and requested the Ministry of Education and Research the reevaluation of the teaching/evaluation methodology, in order to ensure the learning of the official language of the state, on equality terms for all Romanian citizens, regardless of ethnicity, in a non-discriminatory manner.26

25 Art.46 para.4. of the Law of National Education.
As a last remark concerning the education curriculum, we notice the abandonment, in the new law, of the obligation to set up, in each locality, classes or schools with teaching in Romanian, as well as of the limitation to organize groups, classes, schools with teaching in native language in cases when that would "harm" the teaching in or the learning of the official language\(^\text{27}\).

b) In terms of **management of education** at preuniversity level, we believe that we are in the presence of some participation rights of the national minorities in public decisions, and not some proper linguistic rights. The new law insures the representation of the national minorities in the management of the school and the school inspectorships (added by the new law) proportional to the number of classes. It is not expressly provided if the disposition applies only in relation to the number of classes taught in the native languages of the minorities or the number of classes that teaches the native language or other option. A systematic interpretation leans towards the first interpretation, which conditions the representation of the minorities in the management of education by the choice that parents do or by the objective situation of that particular minority. We consider in particular the Roma minority, which, despite the great progress in terms of human resources in the last ten years, does not yet have textbooks and teachers to study all the subjects in the language of the minority and therefore can not make use of the mentioned disposition. A similar situation could be met by the Csango ethnic group, which currently can choose to study Hungarian language or study in the Hungarian language.

Other new special measures, applicable to schools or districts having schools with teaching in the minority languages (and not those teaching the minority languages), refer to choosing one of the school principals and the specialists of the education-related units\(^\text{28}\), among the persons belonging to that particular minority, after consulting with the organization representing that minority in the Parliament\(^\text{29}\), but they do

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\(^{27}\) Provision present in the old law in art. 119 para.2

\(^{28}\) We refer in particular to the County Centers of Educational Resources and Assistance, with important competences in school evaluation and guiding of the children with special educational needs (see art. 45 para.10, art.50 and art. 99 of the Law of National Education)

\(^{29}\) The terminology used in art.45 para.9 and art.97 of the Law of National Education is somewhat unclear in that the minorities which are not represented in the Parliament are ethnic groups and not national minorities in the sense of the Law 35/2008.
not provide, expressly, any sanction for non-compliance. In the same hypothesis, of the education in the minority languages, the school principal or one of the school principals should know the language of that minority.

We believe that the new regulation takes also into account the adaptation of educational management to the specific needs of national minorities, with the opportunity for the national minorities to participate in public decisions, including the annual schooling plan. The number of classes taught in the native language, organized by the annual schooling plan could be in some cases, a source of conflict states, with inter-ethnic substrate. Such a case was referred to the National Council for Combating Discrimination in 2009. In this case, the plaintiff considered as discriminatory the schooling plan for the 9th grades elaborated by the defendant, the County School Inspectorship, which, according to the plaintiff, offered "fewer opportunities to continue studies in Hungarian than in Romanian". "Not assigning schooling places for classes thought in Hungarian, taking into account the number of students in the classes taught in Hungarian who graduate the eighth grade, limits their possibility to choose to continue their studies in their mother tongue. 

Likewise has the National Council for Combating Discrimination stated by its ruling.

At the end of this section, we also note that the new regulation accepts, in terms of funding, the increased costs of education in and of...
the mother tongues by establishing the standard costs per student by an
increased factor in these cases.  

Regarding private education, the regulations of the old law are
maintained, in the sense of full freedom to choose the language of
instruction, in compliance with educational standards established by
the law and the Ministry (art. 60 of the law).

In the spirit of the ECHR decisions, taken in the recent years
against the Czech Republic or Croatia, in the cases of Roma students,
for example, the law of education, in the chapter on special education,
prohibits the abusive diagnosis of children based on race, nationality,
ethnicity, language, religion, belonging to a disadvantaged category, the
administrative sanctions having to be applied, after a systematic
interpretation, by the National Council for Combating Discrimination,
and in the cases of criminal acts, by the courts.

If concerning the curriculum, at the level of university education,
it does not seem to be necessary any special measures, other than those
required for the training of teachers to instruct students in a native
language, concerning the management, the law establishes the obligation
of choosing the rector or one of the pro-rectors of the multilingual
universities, among the persons belonging to those particular national
minorities.

At this level, the university level, in addition to the prohibition of
discrimination, it is explicitly specified the possibility of application of
affirmative measures, such as those relating to the allocation of budgeted
guaranteed places for Roma students.

In the context of analyzing the education in or of the mother
tongue, it is worth noticing the apparently similar situation of the
compact classes which study in Hungarian, for example, some of which
are made up mainly or exclusively of children of Hungarian ethnicity and
of those of Roma children. Although, in both cases they represent
compact class apparently on ethnic criteria, however, the two situations
can actually be very different. In the first case, the compact class with the

33 Art. 45 para. 17 of the Law of National Education.
34 See cases Oršuš and others v. Croatia (15766/03), Decision of March 16, 2010, and
D.H and others v. Czech Republic (57352/00), Decision of November 13, 2007.
35 There are also material and moral damages or the possibility to apply to the courts
directly, without resorting to the National Council for Combating Discrimination.
36 Art. 205 para. 6 of the Law of National Education.
Hungarian students is sometimes motivated by parents' request for the registration of the children in classes taught in their mother tongue, the educational curricula being thus adapted to the parents' request, while in the latter case, the formation of the compact class of Roma students, is not always based on parental request and determined by the perspective of exercising their right to affirmative measures such as the study of Romani language, of specific history and traditions, or of adapted musical education. If the formation of these classes, mainly or exclusively with Roma children, has no objective justification, such as the high proportion of Roma children throughout the school, the proximity to the neighborhoods inhabited mostly by Roma, the existence of a curriculum adapted to the parents' request or in the absence of express and informed consent, including on the consequences, as explained by the Strasbourg Court in the case Orsus and others v Croatia, we are faced with a case of ethnic discrimination, falling in the competence of the National Council for Combating Discrimination, contrary also to the express orders of the Minister of Education.