

**Mandates of the Special Rapporteur on the situation of human rights defenders and the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.**

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Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the situation of human rights defenders and Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, pursuant to Human Rights Council resolutions 34/5 and 34/18.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the new legislation regulating civil society organizations' activities, which, if adopted, may have a detrimental impact on the functioning of civil society organizations as well as human rights defenders in Romania.

According to the information received:

On 20 November 2017, the Romanian Senate approved draft Law n° 140/2017, which in its current reading contains a number of amendments to the Law 26/2000 governing the founding and functioning of Romanian Non-Governmental-Organizations (NGOs), and which involves serious restrictions to the functioning of NGOs. If adopted, the draft law would result in amendments being made to three provisions of Law 26/2000, namely articles 38, 41 and 42.

The draft Law is pending approval from the Romanian Chamber of Deputies before its possible adoption into law. It is currently scheduled to be debated in the Chamber of Deputies.

We wish to underline the following gaps for the protection of the right to freedom of association and the right to freedom of expression exacerbated by the proposed amendments with a view to ask Romanian authorities to reconsider the adoption of draft Law n° 140/2017 in its current form. We believe this draft legislation needs to be further aligned with international legal standards and norms, and as such it should not produce any potential detrimental impact on the activities of civil society organizations and human rights defenders in Romania.

**1. Restrictive definition of associations and their activities**

Article 38 of the Law 26/2000 already establishes restrictive criteria regarding what constitutes an "association or a foundation" which are re-cited in the draft Law:

*(1) An association or foundation may be recognized by the Government of Romania as being of public utility if the following conditions are met simultaneously:*

*a) Its activity is carried out for the general or community interest, as the case may be, in one of the following areas:*

- Social Services (Assistance-Protection-Inclusion-Cohesion-Security-Development-Social Economy), Charity and Humanitarian Aid, Health, Sport*
- Education*
- Science, Research, Innovation, Environment and Animal Protection, Consumer Protection*
- National and national minorities' values, Traditions and Cultural Assets*
- Diplomacy and International Relations, Military-Defence-Respect for heroes.*

In addition to the list, the new draft Law would reduce the required period for an association to seek this status from 3 to 2 years, at the same time requiring that the value of assets for each year be equal to the value of the initial assets, a specification of an “algorithm” for recognizing public utility status, with 40% being applicable to the first category, 30% to the second and 10% for each of the following 3 categories.

Article 41 para. C) of the draft Law further provides that an association has:

*“the obligation to not engage in any kind of political activities: fundraising or campaigns to support or oppose a political party or a candidate for a public office in which he/she may be appointed or elected”*

We are particularly concerned that the listed authorized activities and the algorithm are strictly limiting the scope of what constitutes an association or foundation of “public utility”. By limiting the scope of what is considered to be of “public utility”, the authorities could arbitrarily decide to cease an association’s activities that they consider do not fall within the definition. This list has therefore the potential to discriminate a large number of associations and foundations. The algorithm further risks discriminating certain organizations as there appears to be no guidance as to its implementation and application.

We would like to further express our concerns at the prohibition of associations to undertake any “political activities”. In our view, political activities can, and in many cases should, be considered as being of “public utility”. Prohibiting associations to freely carry out “political activities” could jeopardize the role of organizations whose aim is to provide independent, critical and discursive views over the Government’s actions. It could similarly impede organizations to provide an independent assessment and expertise of the human rights situation in the country.

We consider these provisions to be incompatible with the exercise of the right to freedom of expression (article 19) and the right to freedom of association (article 22) of the International Covenant on Civil and Political Rights (ICCPR), ratified by Romania 9 December 1974. We recall that these rights can only be limited if the high threshold established under article 19(3) and 22(2) is met.

In this regard, we would also like to refer to the UN Declaration on Human Rights Defenders, and in particular its article 5 (b), which provides for the right to form, join and participate in non-governmental organizations, associations or groups.

The right to freedom of association serves as a platform for individuals to jointly pursue their interests, independent of government involvement. In order to sustain the rule of law and strong democratic institutions, it is necessary to allow civil society organizations to operate freely and exercise their right to freedom of expression. For instance allowing associations to be vigilant over the activities undertaken by the authorities as a mean to hold it accountable for its actions is essential. Associations should be free to determine and operate within their areas of concern without interference from the authorities (A/70/266, para. 45). The former Special Rapporteur on the rights to freedom of peaceful assembly and association has stressed that members of associations should be free to determine their statutes, structure and activities and make decisions without State interference. Associations pursuing objectives and employing means in accordance with international human rights law should benefit from international legal protection. They should enjoy, inter alia, the rights to express opinion, disseminate information, engage with the public and advocate before Governments and international bodies for human rights (A/HRC/20/27, para 64.).

## **2. Access to funding**

Article 38 para. d) provides:

*“the value of assets for each year of operation is at least equal to the value of the initial assets”.*

We are concerned over the pertinence of this provision, which differs from the current one focusing on the maintenance of asset values and not only on the capacity to deliver activities. Associations are, as per definition, carrying charitable activities with a view to serve the public interest. As such, their income is highly susceptible to fluctuate and this provision could impose a heavy burden on its functioning.

Article 41 provides the following:

*The recognition of public utility status grants the association or foundation, additionally, the following rights and obligations:*

*a) the right to receive free use of public property and access to funding from central and local budgets, according to the following percentage algorithm:*

- 40% *Social Services (Assistance-Protection-Inclusion-Cohesion-Security-Development-Social-Economy), Charity and Humanitarian Aid, Health, Sport;*
- 30% *Education;*
- 10% *Science, Research, Innovation, Environment and Animal Protection, Consumer Protection;*
- 10% *National values and national minorities - Traditions and Cultural Assets;*
- 10% *Diplomacy and International Relations, Military-Defense-Respect for Heroes.*

This provision would replace the right to be given free of charge use of public property assets with the mention that organizations will have the right to receive free use of public property and access to funding from central and local budgets according to a percentage algorithm. As previously discussed, we are concerned this algorithm risks creating discriminatory treatments for associations, in contradiction with international legal standards.

Moreover, article 48 provides that, in the reports associations need to submit periodically to authorities, should be mentioned:

*“the individual or activity (whichever is the case), generating each income, as well as the value of each income shall be mentioned separately”.*

We recall that the ability for associations to access funding and resources is an integral and vital part of the right to freedom of association. We highlight that any associations, both registered or unregistered, should have the right to seek and secure funding and resources from domestic, foreign, and international entities, including individuals, businesses, civil society organizations, Governments and international organizations (A/HRC/20/27, para. 68). It is also considered as a best practice, legislation that does not prescribe the approval of the authorities before receiving domestic and foreign funding, regardless of the goals of the concerned organizations.

### 3. Reporting obligations and termination

According to article 48 of the draft Law:

*“(1) Associations, foundations and federations have the obligation to publish each six months, by 31 July and 31 January, in the Official Gazette of Romania, Part IV, the financial statements for the previous semester.*

*(2) in the published statements, the individual or activity (whichever is the case), generating each income, as well as the value of each income shall be mentioned separately.*

*(3) Failure to publish the declaration under this article conditions infers the suspension of the association, foundation or federation’s functioning for 30 days. If within 30 days, the association, foundation or federation fails to publish the financial statements according to the conditions specified in paragraph (2), the association, foundation or federation, as the case may be, ceases its activities immediately, according to the conditions provided for in Chapter IX ”*

*Article II - (1) Within 90 days from the date of entry into force of this law, associations and foundations which are recognized as being of public utility according to the previous legal provisions, have the obligation to require to public authorities a new recognition, according to the conditions specified in Chapter VI of the Government Ordinance no. 26/2000 on Associations and Foundations, as amended by this Law.*

*(2) For the associations and foundations requesting a new recognition before the expiration of the deadline provided for in paragraph (1), the previous recognition shall be maintained until the competent public authority has a final decision regarding the application.*

*(3) Failure to respect the deadline in paragraph (1) shall entail, as a matter of law, the termination of the public utility recognition for the association or foundation in question.*

*Art. III - Within 30 days from the date this law entries into force, the Government will elaborate the rules on procedures for recognizing public utility status for associations and foundations.*

*Article IV - On the date this law enters into force, the differing provisions are abrogated.”*

This new provision would require all associations to publish their annual financial statements, every six months - by 31 July and 31 January - for the previous semester. The failure to publish these statements would lead to the suspension of the organization’s functioning for 30 days and to the immediate cessation of all its activities if the statement is not published within 30 days according to the conditions provided in Chapter IX about the dissolution and liquidation of associations and foundations. We wish to underline that such requirements do not exist for political parties or corporate entities despite the fact that they could similarly face the same issues regarding to funding.

We consider that States may have a legitimate interest in auditing association's financial records to ensure their compliance with the law. Nevertheless, we are concerned that the draft Law establishes an excessively burdensome procedure for civil society organizations. It could have an important impact on the budget of associations, needing to dedicate more resources to the administrative requirements to the detriment of their activities. Moreover, there is no basis in international law for imposing more burdensome reporting requirements upon associations versus lucrative (A/70/266, para. 54) or political associations.

We consider that reporting requirements should not be burdensome and the size of the organization should be taken into account. Burdensome reporting requirements might indeed be a drain to the normal functioning of an organization and there is a high risk that it would be detrimental to the activities carried out by the organization.

The requirement for already registered associations to re-register within 90 days from the entry into force of this law entails that organizations currently recognized of public utility might lose their status after a decision has been taken on their application by the competent public authority. This situation creates great uncertainty for associations which may have detrimental implications for its functioning.

It should be noted that newly adopted laws should not request all previously registered associations to re-register so that existing associations are protected against arbitrary rejection or times of gaps in the conduct of their activities (A/HRC/20/27, para 62).

We would further like to underline that the right to freedom of association equally protects associations which are not registered. Individuals involved in unregistered associations should be free to carry out any activities, including the right to hold and participate in peaceful assemblies, and should not be subject to criminal sanctions. This is particularly relevant in situations when the procedure to establish an association is burdensome and subject to administrative discretion, as such criminalization could then be used as a means to quell dissenting views or beliefs (A/HRC/20/27, para 56).

Article 42 para. 1 provides that:

*“The recognition of public utility status lasts for a period of 5 years and may be renewed under the provisions of this Chapter”.*

Therefore, the proposed amendment would replace the indefinite recognition of “public utility” status by a mention that such status is to last 5 years and is subject to renewal. Furthermore, article 42 adds the need for the competent administrative authority, together with the Ministry of Justice, to issue an annual report of compliance with the conditions that led to the recognition, by the authorities, of the association or foundation's public utility status.

We are concerned by the extra-burden this provision is imposing on associations, being under threat every five years, to lose their “public utility” status and therefore their

ability to operate. Moreover, paragraph 3 does not indicate how the issue of compliance is to be determined. It seems the administrative authority alone will assess whether the association fulfils the conditions determined in the annual report authored by them. As the process is unilaterally led by the authorities, there is a risk of errors in the assessment, as well as the risk the concerned authority could discretionally withdraw the status, creating an even further unstable situation for associations and foundations with time gaps in the conduct of their activities. It must also be noted that the draft Law neither foresees a possibility to rectify the activities for which they lost their status, nor to challenge the decision of the administrative authority in case of non-renewal.

We consider that the right to freedom of association equally protects association that are registered and not registered (A/HRC/20/27, para. 56) and that the suspension and the involuntarily dissolution of an association are the severest types of restrictions on freedom of association. As a result, it should only be possible when there is a clear and imminent danger resulting in a flagrant violation of national law, in compliance with international human rights law. It should be strictly proportional to the legitimate aim pursued and used only when softer measures would be insufficient.

Finally, such measures should only be taken by independent courts (A/HRC/20/27, para. 75). Moreover, we consider that any refusal to renew the already granted status to an association or the rejection of the application to be granted this status, should be duly communicated in writing to the applicant and association should have the opportunity to challenge this decision before an independent and impartial court (A/HRC/20/27, para. 61).

We would appreciate receiving a response within 60 days. We would like to inform your Excellency's Government that this communication, as a comment on pending or recently adopted legislation, regulations or policies, will be made available to the public and posted on the website page for the mandate of the Special Rapporteur on the right to freedom of expression: <http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/LegislationAndPolicy.aspx>. Your Excellency's Government's response will be made available on the same page as well as in the report to be presented to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of our highest consideration.

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and expression

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