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Comments on Ordinance #26
of 30 January 2000 on Associations and Foundations in Romania
August 2001

The International Center for Not-for-Profit Law ("ICNL") is pleased to have this opportunity to provide comments on Ordinance #26 of 30 January 2000 on Associations and Foundations in Romania ("Ordinance").

ICNL is an international organization that works globally to strengthen the legal framework for non-governmental organizations (NGOs). We have provided assistance on NGO law reform projects in over eighty countries. In Central and Eastern Europe, ICNL is working in fifteen countries as part of the USAID Democracy Network Project. ICNL has worked with UNDP, UNHCR, the Council of Europe, and other mutlilateral institutions on NGO law reform. ICNL also wrote the World Bank Handbook on Good Practices for Laws Affecting NGOs (Discussion Draft), and the Open Society Institute Guidelines for Laws Affecting NGOs.

We are aware that the Ordinance has been submitted to Parliament, but are uncertain about when the Ordinance may be considered by Parliament. Because of the importance of the Ordinance and its impact on civil society and the non-profit sector, we prepared comments designed to address weaknesses in the Ordinance and to recommend improvements. These comments are submitted with an appreciation for the laudable work performed by the drafters and in recognition that the Ordinance represents a dramatic improvement over the prior legal framework governing NGOs. We hope that these comments prove useful and are ready to provide further assistance.

Introductory Remarks

The Ordinance is a great leap forward. It replaces the previous Law #21, which dates back to 1924 and did not provide adequate safeguards or a complete framework for NGO regulation. The new Ordinance accomplishes several significant improvements. First, it streamlines the registration process for both associations and foundations. The Ordinance clearly defines the necessary documents for registration, sets a short time limit within which the registering body must act, and allows for an appeal upon denial. Second, the Ordinance recognizes and extends benefits to public benefit organizations. Third, the Ordinance allows associations and foundations to engage directly in related economic activities and to establish subsidiaries to carry out additional (unrelated) activities. Fourth, the Ordinance establishes a national registry of NGOs.

Drafters of the Ordinance should be commended for their work and generally progressive piece of legislation. Were Parliament to pass the Ordinance without amendment, the new regulatory scheme would be a dramatic improvement over the previous Law #21. Still, there are problems with the Ordinance and provisions in need of rethinking and revision. ICNL respectfully submits these comments in the hope that the

Ordinance can be further improved and comply more fully with international standards and regional best practices.

To determine the strengths and weaknesses of the Ordinance, we find the European Convention on Human Rights ("ECHR"), Article 11 (1953) a useful focal point. The ECHR provides, in relevant part, that:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interest.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and fredoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Government legislation or regulation may run afoul of Article 11 of the ECHR where it places restrictions on the freedom of association which amount to interference. The question which follows is whether or not that interference is legitimate and necessary in a democratic society. In deciding whether a particular interference is necessary to achieve a legitimate aim, we must ask whether the interference was proportionate to the aim pursued. In holding that Greece had violated Article 11 in refusing to register a specific association, the European Court of Human Rights said, among other things:

> The right to form an association is an inherent part of the right set forth in Article 11 … That citizens should be able to form a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the right to freedom of assciation, without which the right would be deprived of any meaning … Certainly, States have a right to satisfy themselves that an association's aims and activities are in conformity with the rules laid down in legislation, buty they must do so in a manner compatible with their obligations under the Convention. Sidiropoulos and Others v. Greece, European Court of Human Rights (Chamber decision, July 10, 1998).

The general comments address five broad issues: (1) registration requirements; (2) organizational structure; (3) modification requirements; (4) the definition of public benefit status and the conditions for obtaining public benefit status; and (5) the recognition of foreign civic organizations. Remaining issues are addressed in the section-by-section analysis, which follows the general comments.

General Comments

I. Establishing and Registering Associations (Chapter 2, Section 1)

A) Statement of Issue:

Do the registration requirements, as contained in Chapter 2, provide for a quick, easy and inexpensive registration process?

B) Discussion:

The registration requirements contain specific provisions, discussed below, which are unnecessary and can only hinder a quick, easy and inexpensive registration process.

Most critical to the registration of civic organizations is ensuring a quick, easy and inexpensive process. It follows that registration laws should require the filing of only a small number of clearly defined documents. Generally required are the constitutive act of the organization and the statute (or by-laws). These documents should state the nature and purpose of the organization, set up an adequate governance structure, identify the founders, board members and managers, state the location of the principal headquarters, and identify general representatives of the organization. Requiring information beyond these basic essentials may unnecessarily complicate the process and place burdens on both the civic organization and the registering authority. Failing to require any of these basic essentials may, on the other hand, create operational difficulties for the civic organization and monitoring problems for the registering authority.

Article 6(2) defines what information must be contained in the constitutive act (the basic founding document). In addition to requiring the purpose of the organization (A.6(2)(b)), the headquarters (A.6(2)(d)), the founders and adminstrative governing bodies (A.6(2)(g)), and the general representative (A.6(2)(h)), the Ordinance also requires the "identification data of all associates" (A.6(2)(a)) and the "initial patrimony of the association" (A.6(2)(f)). Both requirements are problematic.

To require civic organizations to file identification data for each and every member, along with the signatures of all members (A.6(2)(i)), is unduly burdensome for civic organizations. More significant, however, may be the burden such a requirement places on the registering authority. Questions arise regarding the consequences of changes in membership: what happens when a member resigns, dies or joins the organization? Must the civic organization modify the constitutive act and register the modification in the Registry every time such an event occurs? Is this efficient for either the civic organization or the registering body? A critical distinction lies between including the names of founders, board members and managers in the constitutive act and including the names of all members. Changes in board members and managers will be relatively rare and infrequent, meaning that modification will not turn into a significant burden. Changes in membership, however, may well be commonplace.

More striking is requiring organizations to list the "initial patrimony of the association"(A.6(2)(f)). Neither in the United States, Western Europe, nor in any other

country in Central or Eastern Europe is capitalization required for an association. Associations should not be required to declare or have any assets during the registration phase or at any other time. Financial requirements or "assets" requirements are particular to foundations, not to associations. Traditionally, associations are membership-based organizations (*universitas personarum*) formed to serve the public interest or the mutual interest of their members, without any requirement for a minimum amount of assets. Foundations, by contrast, traditionally require property dedicated to a specific purpose (*universitas rerum*); nonetheless, even for foundations, the trend is to require only a nominal amount of property. A requirement of capitalization for associations can only hinder and frustrate the growth of civil society.

Recommendation:

Based on the foregoing, we recommend that the Ordinance simplify the filing requirements for civic organizations. To reduce unreasonable burdens on both the civic organization and the registering bodies, the Ordinance need not require that registration documents contain identification data of all members. To remove unreasonable barriers to registration, the Ordinance need not require that registration documents contain the initial assets of the association; indeed, there should be no property requirement for associations at any time.

II. The Organization and Operation of Associations (Chapter 3, Section 1)

A. Statement of Issue:

Does the Ordinance provide for an adequately flexible organizational structure?

B. Discussion:

No, the Ordinance establishes an excessivly rigid organizational structure, which will hinder many civic organizations in their operations.

The laws governing formal civic organizations should require that certain minimum provisions necessary to the operation and governance of the organization be stated in the constitutive act of the organization. Certainly, the constitutive act should set forth the basic governance structure (for example, the highest governing body, the minimum number of times it must meet each year, its basic powers, and any restrictions on its ability to delegate power to others). In addition, the law should also state whether additional governing bodies such as a supervisory board, an audit commission, and a management body must be specified in the constitutive act.

Beyond outlining basic matters of governance, the laws should preserve some room for flexibility on nonessential matters. Organizations should be able to set up the governing bodies that most effectively lead to the realization of the organization's purposes. For example, as an organization grows in size, it may wish to create a finance committee to manage its assets; the organization should not have to amend its constitutive act to make such a change in its governance structure. Such a procedure would prove burdensome both to the civic organization and to the registering body.

Rather, the highest governing body should be able to adopt rules and resolutions governing details in its operation more easily, as its needs change.

More importantly, provisions mandating a specific internal governance structure run afoul of international guidelines. Freedom of association encompasses the freedom of founders to regulate the organization's internal governance, beyond the fundamental issues mentioned above. Undue interference on issues which can be left to the discretion of founders are likely to be violations of Article 11 of the ECHR.[1]

Several provisions within Chapter 3 fail to provide sufficient flexibility in the organization of NGOs. First, Article 20 of the Ordinance lists the required governing bodies of the association: "(a) the general assembly; (b) the board of directors; (c) the censor or, if such be the case, the committee of censors." By requiring all associations to use this governance structure, the Ordinance establishes an unreasonably rigid governing structure for many organizations. Small associations especially may not need to create a board or censor. Membership associations often operate without a board of directors. By insisting on a uniform governance structure, the Ordinance fails to recognize the variety of civic organizations and the variety of governance approaches that may fit an organization's needs.

Second, Article 27 is problematic for the same reasons. In seeking to regulate internal financial control, the provision lays down unnecessarily rigid requirements. As mentioned above, it will not always be necessary for associations, especially small associations, to employ censors to handle the finances. It is also unclear why censors should have the authority to participate in meetings of the board of directors, as specified in A.27(3)(c). The question of independence from the board arises; is the provision actually accomplishing what it seeks to accomplish?

Similarly, one might raise the same objections against Articles 28 and 31, relating to the governance of foundations.

C. Recommendation:

In light of the need for and benefit of granting associations and foundations flexibility in what kind of governing bodies may be appropriate to their needs as organizations, we suggest amending Articles 20 and 28 so that they set forth a less rigid governance structure. While recognizing the need for defining the highest governing body and its authority, we recommend simply allowing organizations to create other governing bodies, like the board of directors or auditing committee, where organizations feel it necessary and appropriate to do so. In addition, we recommend eliminating Articles 27 and 31 to give civic organizations increased flexibility.

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[1] The Croatian Constitutional Court confronted this issue in their decision of February 3, 2000, (published in the Official Gazette No. 20 of February 16, 2000). There the Court held that §11(3) of the Croatian Law on Associations, which prescribed the mandatory content of the by-laws, was unconstitutional because it failed to meet the proportionality test. In particular, the Court referred to mandatory provisions regarding membership fees, members' liability, comprehensive internal governing structure, the liability of the members of the governing bodies and the decision-making procedure as provisions "which could have been left to the discretion of founders or addressed in other acts of internal governance."

III. Modifying the Constitutive Act and the Statute of the Association or Foundation (Chapter 4)

A. Statement of Issue:

Does the Ordinance establish reasonably flexible procedures for modification?

B. Discussion

No, the Ordinance, through Chapter 4, creates a burdensome modification procedure, requiring organizations to re-register rather than simply to file notification papers. Moreover, Chapter 4 fails to distinguish between amendments of significant issues and amendments of non-essential matters.

A civic organization should be allowed to amend provisions in its constitutive act and statute without having to entirely re-register the organization. The law should make a distinction between significant matters, requiring notice to the registering authority, and technical issues, requiring no notice. Significant matters include, for example, the address of the organization, the names of general representatives, or the purposes of the organization. Where such matters are modified, organizations should simply be required to file papers indicating the nature of the change to the registering authority. Of course, some restrictions on the ability of an organization to change purposes are appropriate, depending on the nature of the change. If, however, the change in purpose does not amount to a change in status (i.e., from non-profit to for-profit status, or from PBO to MBO status), then the organization should be able to make the change easily, through notice and not through re-registration.

Technical matters include, for example, internal operational issues commonly left to the discretion of the organization, such as voting requirements, the number of directors, or the creation of officerships. These operational details should be subject to change without amending the constitutive act or statute. In this way, civic organizations remain flexible in their operation and registering authorities are not overly burdened with notices of modification.

Article 33 is troublesome in that it requires organizations to register all modifications in the Registry by submitting a petition and following registration procedures outlined in Articles 8-12. A preferable alternative would be for organizations to file papers indicating the change and submitting an amendment to its statute where that is appropriate. Furthermore, Article 33 makes no distinction between significant and technical changes to the founding papers of an organization. While it makes specific requirements for changes in the address of an organization, it seems to treat all other potential changes in the same bureaucratic way. This will inevitably prove burdensome to both civic organizations and registering authorities. Furthermore, because of the significant burden, civic organizations may well seek to avoid compliance for minor changes, raising the issue of monitoring by the registering authority and increasing burdens on the government.

C. Recommendation

To simplify the modification of the constitutive act and statute, we suggest drawing a basic distinction between significant and technical changes, requiring amendment of the founding papers for significant changes only. With this change, civic organizations would have more operational flexibility and registering authorities less administrative burden.

IV. Associations and Foundations with Public Benefit Status (Chapter 6)

A. Statement of Issue:

Does the Ordinance adequately define public benefit status and set appropriate conditions for obtaining such public benefit status, as outlined in Article 38?

B. Discussion

No, Article 38 defines public benefit status too vaguely and establishes conditions for recognition which are potentially too restrictive and burdensome. The article sets four conditions which civic organizations must meet to be recognized as an organization with public benefit status. The first, contained in 38(1)(a), is certainly a legitimate requirement; the remaining three, contained in 38(1)(b,c,d), are potentially problematic.

Generally, the issue of public benefit status is decided by using a primary purpose test. Simply put, the registering authority focuses on the primary purpose and activities of the organization and extends public benefit status to those organizations whose primary purpose and activities directly benefit the public or a significant portion of the public. Generally, regulatory systems define a limited number of acceptable purposes which qualify for public benefit recognition; it is also common to find on such lists a catch-all category such as "or any other organization formed primarily for the benefit of the public."

Article 38 contains no list of acceptable public benefit purposes, but instead limits its definition to activity "carried out for general or community interest". The vagueness of the definition opens the door to varying and inconsistent criteria being promulgated by the respective administrative authorities authorized to determine public benefit status. This problem is compounded by the fact that such questions as – who is the competent reviewing authority and where should the NGO apply – will not always be clear to potential PBOs or to public authorities. Conflicts of competence between public authorities (Article 39) could prove common, with NGOs facing varying public benefit criteria at multiple reviewing authorities. The Ordinance would benefit from a clearer, more specific definition of public benefit activity.

In addition, Article 38 lays down three conditions which may prove overly burdensome to NGOs: the requirement of at least three years of operation, a program report and financial report, and the maintenance of the same value of founding assets. All three pose significant barriers to obtaining public benefit status. Certainly, public authorities will be able to ensure – through a three-year period – that an NGO's activities

fall within its proclaimed public benefit purpose. But is such a lengthy period truly necessary? Organizations whose primary purpose is clearly for the benefit of the public will be unable to apply for public benefit status for three years, and afterwards, only by clearing the necessary reporting hurdles. Such restrictions will hinder the vibrant growth of PBOs, the vary category of civic organizations regulatory systems should most strongly support.

C. Recommendation

The importance of this issue cannot be overstated. We strongly recommend that Article 38 be amended by more specifically defining public benefit activity in sub-section (a) and by eliminating or modifying sub-sections (b), (c) and (d). The decision by the Government of Romania on granting public benefit status should depend on the primary purpose of the organization, as most nearly stated in sub-section (a).

V. Special Provisions (Chapter 11)

A. Statement of Issue:

Does the Ordinance improperly interfere with the ability of foreign civic organizations to register and operate in Romania?

B. Discussion

Yes, Article 76(1) restricts the ability of foreign civic organizations to register and operate in Romania. Specifically, the Article conditions recognition of foreign organizations on the basis of reciprocity and on prior approval from the Government. Neither condition is supportable under international guidelines.

At issue, under Article 11 of the ECHR, is whether the restrictions imposed by Article 76(1) are legitimate and necessary in a democratic society. The presumed aim of the restrictions is to protect Romanian citizens from harm by legal entities operating within Romania, certainly a legitimate aim. Foreign NGOs must certainly be subject to Romanian court jurisdiction in case of breach of contract or acts of negligence or criminality. But are the means prescribed proportionate to the aim pursued?

The answer is certainly no. First, reciprocity is a clear violation of Article 11. There seem to be no legitimate reasons connected with the actions of the home state, which would justify restrictions on foreign organizations.[2] In other words, the actions or laws

[2] In their decision of February 3, 2000, (published in the Official Gazette No. 20 of February 16, 2000), the Croatian Constitutional Court struck down a provision in the Croatian Law on Associations, which allowed foreign citizens to be founders of a registered association only under the condition of reciprocity. The reciprocity requirement also extended to foreign legal persons. These provisions were challenged on the ground that they did not satisfy the proportionality test under Article 11 of the ECHR. The Court found that the reciprocity requirement violated Article 11 and the Croatian Constitution, which guarantee the freedom of association to "everyone" and "citizens" respectfully without further reference to the country of citizenship or other conditions. The Court held that "there are no legitimate reasons which would justify restrictions imposed on foreign domestic and legal persons in exercising the freedom of association … which are attached to the actions of their respective states."

of one's state should not have any impact on one's ability to associate in a foreign country. Secondly, the requirement for prior approval from the Government is not justifiable. No standards are prescribed in the Ordinance to guide the Government's decision, creating opportunity for arbitrary governmental actions which might discriminate against foreign organizations.

To meet the legitimate interest of protecting Romanian citizens (through the jurisdiction of the country's courts over the foreign organization), it is sufficient if the organization itself is properly formed under the Ordinance. Registration provisions require all civic organizations to identify a specific address, legal representative and governing bodies. Through the locally-based legal representative, other parties have adequate means for redressing legal claims against the organization.

C. Recommendation

It is generally accepted that the law should provide a level playing field for foreign and domestic organizations, permitting the former to participate actively in another country's civic activities. Article 76(1) instead creates an unbalanced playing field, making the establishment of foreign organizations burdensome to both foreign organizations and registering authorities alike. We therefore suggest revising Article 76(1) and eliminating the illegitimate restrictions for recognition of foreign entities, thereby allowing both foreign and domestic organizations to operate on equal footing.

Section by Section Analysis

Article 1	The term "non-patrimonial" or "not-for-profit" is not clearly defined by the ordinance. While the force and clarity of the term "non-patrimonial" may be somewhat lost in translation, it may also deserve more attention. The principle of nondistribution is the single most important feature distinguishing formal civic organizations from for-profit entities and cannot be overemphasized in setting the scope of the ordinance.
Article 6(2)	Information required to be included in constitutive act – the identification data of all associates (a), the initial patrimony of the association (f), and the signatures of all associates (i) – are overly burdensome requirements. See Section I above.
Article 6(3)	The statute or by-laws should contain more internal governance requirements. The statute should identify the highest governing body of the organization and stipulate the minimum number of times it must meet each year. The basic powers of the highest governing body should be spelled out, together with any restrictions on its power to delegate duties to others. Any restrictions on the powers of the organization, such as a prohibition on the distribution of any profits, should be stated in the statute. Admittedly, these issues are later addressed by the ordinance in

Articles 21, 24 and 27. Still, there is benefit to leaving such governance issues to the discretion of the organization and requiring that the issues be covered in the governing documents.

Article 8 — We commend the drafters for setting a short time limit within which the registering judge must act (three days). Our only concern is whether three days is practically sufficient time for the judge to review the petition for registration and issue a written "summation". It may also be useful to clarify whether the three days referred to are three calendar or business days.

Article 12 — According to the Article, registration certificates are only issued upon request. We would recommend eliminating that bureaucratic step and requiring that registration certificates issue automatically to streamline the process.

Article 13 — It is commendable that the ordinance contemplates the creation and establishment of local branches of associations. Article 13, however, apparently requires the branch to follow a registration process nearly identical to that required of the association itself. If so, this article serves no discernible purpose. If a branch organization must follow similarly restrictive registration procedures, what benefit is there in registering as a branch organization? A branch, unlike a subsidiary, does not constitute a separate legal entity.

Article 15 — The minimum required amount to create a foundation will vary considerably from country to country. The trend is to require only a nominal amount of property. Is the required minimum amount (100 times the minimum gross salary) too high?

Article 20 — Article 20 lists the governing bodies of the association. Assuming the listed bodies are intended to be mandatory, this is troublesome. The only mandatory operating body should be the general assembly; associations then should retain the authority to create other bodies, if necessary to their needs. Many organizations, such as mutual benefit organizations, will need only the general assembly to run its affairs. See Section II above.

Article 22 — This provision, relating to conflicts of interest, is too narrow; it does not prohibit the full range of potential conflicts of interest. Of course, it is nearly impossible to anticipate with specificity all kinds of conflict that should be avoided; still, Article 22 only addresses a limited number of potential conflicts. It makes no reference, however, to avoiding conflicts arising from indirect private benefit or self-dealing. To more effectively prohibit the full range of abuses that can arise from conflicts of interest, the ordinance could alternatively prohibit conflicts of interest in general

terms and allow courts to determine whether there has been a violation on a case-by-case basis.

Article 27 This provision, in dealing with internal financial control, probably lays down requirements that are too harsh. Two questions arise. First, will all associations, regardless of size and activities, need a censor to ensure appropriate financial control? Second, should the censor sit in on board meetings? By so doing, the censor, who will want to be independent of the board, may instead find his independence undermined.

Article 29(6) Article 29(6), which limits the ability of the foundation to change purposes, is unduly narrow and severe. A change in purpose is only allowed if the original purpose "has been totally or partially accomplished or if it cannot be accomplished anymore." On the contrary, it should be possible for civic organizations, including foundations, to amend their statutes easily to change their activities or purposes. Certain restrictions on the ability to change purposes are, of course, appropriate; for instance, organizations which have obtained public benefit status should not be able to change their purpose to that of another type of organization not providing a public benefit. But organizations should not be restricted from changing one public benefit purpose to another public benefit purpose; A.29(6) will only frustrate the operation of foundations.

Article 31 The same questions which arose under Article 27 arise here. Is a committee of censors always necessary? Won't it depend on whether or not the foundation is treated as a public benefit organization or not?

Chapter 4 See Section III above.

Chapter 5 Chapter 5, by allowing for the creation of federations, makes no meaningful contribution to the regulation of associations and foundations. Generally, the ability of associations to form a separate association, or federation, is clear without specifically addressing the issue. In other words, most laws governing the creation of associations and foundations specify that such organizations may be formed by natural and legal persons pursuing a non-profit purpose. Clearly, associations, as legal persons, have the right to form separate associations. Thus, specific provisions allowing for federations add little.

Chapter 5 (Articles 35-37) of the Ordinance specifies the right of two or more associations or foundations to establish a federation. For the aforementioned reasons, Chapter 5 is at best redundant. At worst, the provisions confuse rather than clarify the registration of federations. Regardless, the Ordinance adequately addresses the right of associations to

form federations in Article 1 (“Natural and legal persons … may establish associations and foundations …”).

Chapter 6 See Section IV above.

Chapter 7: Article 46 defines the potential sources of revenue, including membership fees, interests from passive investments, revenues from direct economic activities and “(f) other revenues stipulated by law.” Subsection (f) raises concerns; as a catch-all category, it is unduly restrictive. It seems to limit potential sources of revenue to those revenues specifically provided by the law. It should instead be phrased to include any revenue not prohibited by the law. By broadening the provision accordingly, it can then properly fulfill its function as a catch-all category.

Chapter 11 See Section V above.