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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT OPINION

**ON THE DRAFT LAW ON RIGHTS OF NATIONAL MINORITIES
OF BOSNIA AND HERZEGOVINA
PREPARED BY THE BiH MINISTRY OF HUMAN RIGHTS AND
REFUGEES, APRIL 18TH, 2001**

**Adopted by the Venice Commission
at its .. Plenary Meeting
Venice,**

**On the basis of comments by
M. G. MALINVERNI (member, Switzerland) and
P. VAN DIJK (member, the Netherlands)**

OPINION

of the Venice Commission's Working Group on the draft Law on the Rights of the National Minorities of Bosnia and Herzegovina

1. Introduction

In May 2001, the Office of the High Representative requested the Venice Commission to give its opinion on the Draft Law on the Rights of the National Minorities of Bosnia and Herzegovina (hereinafter referred to as "the Draft Law"), prepared by the BiH Ministry of Human Rights and Refugees (CDL (2001) 68). A Working Group, composed of Mr Pieter Van Dijk and Mr Giorgio Malinverni, was set up to study the question. It prepared the following opinion, which was adopted by the Venice Commission at its .. Plenary Meeting (Venice, ...) and was sent to the Office of the High Representative.

2. General Comments

The Draft Law is broadly inspired by the Framework Convention on the Protection of National Minorities (hereinafter referred to as "the Framework Convention") and provides a wide range of entitlements for citizens belonging to national minorities. It specifies that it does not apply to persons belonging to the three constituent peoples; the drafters presumably intended to comply with the ruling of the Constitutional Court of 9 November 2000, that Bosniacs, Serbs and Croats enjoy equality as groups and thus cannot constitute a minority, irrespective of their numerical presence in a given area.

At times, the entitlements under the Draft Law go beyond the internationally established minimum standards of protection. This attitude is certainly to be welcomed. The successful implementation of these entitlements, however, seems to be marred by the fact that the significant costs relating thereto are exclusively imposed on the local authorities; although this can be understandable, in the Bosnian context where so little competencies lie with the central State, it may have the consequence that the realization of the minorities' rights ends up depending on the availability of financial means within the – presumably very limited - budgetary resources of the local authorities.

3. Title

Given that the Draft Law does not grant any collective rights, it would be preferable to specify, already in the title, that the Draft Law sets out the rights of persons belonging to national minorities.

4. Definition and list of minorities

According to Article 1 of the Draft Law, only those persons belonging to national minorities who are citizens of BiH are afforded protection under the Draft Law. Such restriction departs from certain recent tendencies of minority protection in international law (interpretation by

the Human Rights Committee (General Comment No. 23 of 6 April 1994), of Article 27 of the UN Covenant on Civil and Political Rights and practice of the OSCE High Commissioner on National Minorities). It is true that Article 5 of the Draft Law points out that the definition of minorities contained therein is for the purpose of the Law only, which entails that persons belonging to national minorities who are not or not yet BiH citizens are at any rate afforded protection under international law.

In the opinion of the Rapporteurs, two options are possible.

- a. The requirement of citizenship is abolished so that the application of the Draft Law is not restricted to citizens only. In this case, those entitlements which require specific qualifications such as citizenship or residence or the existence of a “genuine link” with BiH, should be regulated separately. In particular, the right to vote and to stand for office would be regulated in the relevant laws on elections and the Draft Law would merely set out the principle of an adequate representation of citizens (or, where relevant, residents) belonging to national minorities at the levels of the State, entities, cantons, cities and municipalities.
- b. The requirement of citizenship is maintained. In this case, it would be advisable to supplement Article 5 by an explicit provision to the effect that the Draft Law does not limit or derogate from the rights and freedoms to which those members of national minorities who are not citizens, are entitled under Article 27 of the UN Covenant on Civil, as interpreted in General Comment no. 23 and by the OSCE High Commissioner of National Minorities, and under the Constitution of BiH.

Article 5 of the Draft Law attempts at defining “national minorities”. While such definition is very broad - in particular because the enumeration of distinctive elements is not exhaustive (“other features”) – it lacks the essential reference to the wish of the persons belonging to the group of people in question to preserve their identity: this reference should therefore be added.

Article 5 further contains an exhaustive list of minorities explicitly recognised and protected in Bosnia. As it stands, this list would cause the exclusion of non-listed minorities from the various entitlements under the law and thus violate the concept of equal protection of national minorities. Accordingly, its abolition is strongly recommended. If it were to be kept, it should be made open-ended (by adding “and others” or “such as”).

Finally, it seems more appropriate to group Articles 1 and 5 together, as they both relate to the definition of national minorities for the purpose of the application of the Draft Law.

5. Protection of minorities under international law and “direct” applicability (incorporation into the Bosnian Legal System) of the Framework Convention on the Protection of National Minorities

Article 2 § 1 of the Draft Law, inspired by Article 1 of the Framework Convention, stipulates that “the protection of national minorities and the rights and freedoms of these minorities shall be an integral part of the international protection of human rights and freedoms”. In the Rapporteurs’ opinion, however, it is not the task of a domestic piece of legislation to set out an international obligation.

Paragraph 2 further provides that the Framework Convention “shall directly apply and be an integral part of the legal system of BiH and the entities within BiH”. It is not appropriate to refer to direct applicability, given that most provisions in the Framework Convention are designed to be of a programme-type nature only, i. e. non self-executing (see the Eplanatory Report to the Framework Convention, point 11).

Article 2 could be rephrased and contain a reference to all international legal obligations of BiH in the area of the protection of national minorities and to the need to interpret the draft law in the light of the Framework Convention and of the practice of its Advisory Committee.

6. Prohibition of assimilation

Article 3 of the Draft Law prohibits assimilation of members of national minorities against their will, but does not set out any clear positive obligation on the State to protect members of minorities from any action by private individuals aimed at their assimilation. The scope of the second sentence of Article 3 should therefore, in the Rapporteurs’ view, be broadened to be in line with Article 5 § 2 of the Framework Convention.

7. Self-organization

Article 4 provides for the right of members of minorities to “self-organization”. It should be clarified whether this right amounts to freedom of association only or also to a certain measure of local self-government in accordance with Article 15 of the Framework Convention. Self-organization is guaranteed with a view to expressing and protecting the minorities’ specific freedoms, rights, interests and needs in various fields including culture, religion and education (in respect of culture, the same right is recognised under Article 17). The scope of this provision as regards “social” and “economic” rights should be clarified. It would also be advisable to make reference to the need to comply with the applicable regulations on founding and running associations in BiH.

8. Harmonization of Entities’ and local legislation and regulations

It should be stipulated, in Article 7 of the Draft Law, that the regional and local regulations should be “in conformity with this Law and international conventions regulating the issues of importance for national minorities”.

9. Funding

The Draft Law entails extensive duties – hence significant expenditures - for the authorities of Bosnia, in particular for the cantons and the municipalities. Article 8 provides for the need of local authorities to “secure” the necessary funds. The effect of this provision should be clarified; in particular, it should be specified whether there will be any funding from central resources (in the explanatory note accompanying the draft it is stated that for the implementation of the law at the state level no major financial resources are required) and whether, otherwise, the realization of the rights guaranteed in this law is conditional upon the existence of adequate funds “within the budgetary resources” of the local authorities (see above, “General Comments”).

10. Transfrontier co-operation

Article 6 of the Draft Law sets out the duty of the authorities to facilitate contacts of the persons belonging to national minorities with persons “of the same minority” and with peoples “in their countries of descent”. Articles 17 and 18 para. 2 of the Framework Convention, however, provide for a wider range of contacts that the persons belonging to national minorities are entitled to establish and maintain. Article 6 of the Draft Law should be rephrased in the broader terms of the Framework Convention, and thus permit contacts with persons of the same nationality.

11. Equality of treatment of majorities where they constitute a minority

Article 9 of the Draft Law guarantees the principle of equality of treatment, by the persons belonging to national minorities, of the majorities in areas where the latter constitute a minority. The wording of this provision should be made more intelligible.

12. Use of languages

Article 12 of the Draft Law grants the right to use the minority language in the relations with the administration and to display the names of cities, streets etc. also in the minority language, to persons belonging to national minorities which constitute an absolute or relative majority.

Insofar as the notion of “relative” majority is concerned, see below (“Education”).

Articles 10 § 2 and 11 § 3 of the Framework Convention grant these rights to persons belonging not only to numerically significant minorities, but also to “traditional” minorities. It is unclear whether the same protection is guaranteed by the quota system introduced in Article 12 of the Draft Law. It would perhaps be preferable explicitly to refer in Article 12 to “traditional” minorities as well.

13. Education

In view of the relation between Articles 13 and 14, Article 14 which provides for the right to education in and of the minority language in public schools should, in the Rapporteurs’ opinion, precede Article 13 which refers to the right to set up private schools.

Article 14 grants persons belonging to national minorities the same right to education in their language if they constitute either an absolute majority or a relative majority of the population. It seems difficult to understand that the same rights should be granted to the absolute and to the relative majority, given that a “relative” majority can in fact amount to a very small portion of the population. Furthermore, one could imagine situations in which other national minorities, only locally slightly less numerous than the one representing the relative majority of the population, would be excluded from the entitlement under Article 14, which would be unfair.

In the Rapporteurs’ opinion, it would be preferable to introduce a quota system, instead of the notion of absolute or relative majority.

Article 14 further grants persons belonging to a minority the right to teaching of their language as well as teaching of their literature, history and culture in their language as additional training, and this irrespective of their number and at their mere request. This provision, which goes far beyond the guarantee of Articles 12 and 14 of the Framework Convention, entails considerable expenditure and risks being not viable. It would perhaps be preferable to grant this entitlement to persons belonging to national minorities who inhabit an area in substantial numbers and only if there is sufficient demand (see Article 14 of the Framework Convention).

Article 14 of the Draft Law, in its second paragraph, should make clear that the education and training provided for in the first paragraph shall be funded by the authorities on an equal footing with education in the majority language.

Article 13 leaves it to the Entities and Cantons to “determine the possibilities” for members of national minorities to establish and maintain private educational facilities.

It would be preferable to rephrase the article, making it clear that entities and cantons must secure these possibilities according to detailed provisions to be set out in the relevant laws.

14. The media

Article 15 of the Draft Law grants members of national minorities the right to establish radio and TV stations and to publish newspapers and other printed information.

It would be necessary to make this right conditional upon the respect of the applicable regulations. The possibility for the competent authorities to require the licensing – without discrimination and based on objective criteria - of sound radio and TV broadcasting should also be left open, in line with the terms of Article 10 of the European Convention on Human Rights and of Article 9 § 2 of the Framework Convention.

Furthermore, in the first paragraph it should be clarified if and to what extent these media will be funded from public sources, and in what way equal treatment will be guaranteed in this context.

Article 16 sets out a duty of public radio and TV stations to secure “at least once a week one-hour informative programs” for persons belonging to the national minorities. The provision of a fixed share and the lack of indication of whether this share would be reserved for all the minorities or each of them make this provision obscure. It would be preferable to provide for the need to secure an “adequate” (in terms of both duration and quality) share of broadcast time for the national minorities.

15. Culture

In respect of the founding of libraries, museums etc. as well as of the maintenance of monuments, reference should be made in Article 17 of the Draft Law to the need to comply with the applicable regulations.

The “proportional” representation of all national minorities in archives etc. seems difficult to achieve: the scope of this provision should therefore be clarified.

In the first paragraph it should be clarified if and to what extent these media will be funded from public sources, and in what way equal treatment will be guaranteed in this context.

16. Use of language in contacts with various institutions

Article 18 clearly applies to public institutions only. Insofar as the “relative majority” is concerned, see above (“Education”).

In fact, this article does not relate to “economic and social rights”, as its title suggests, but to the use of the minority language by certain categories of people in their economic and social life (see Article 13 of the European Charter for Regional and Minority Languages): accordingly, the title should be suppressed, and this article moved to the III Section of the Draft Law.

17. Electoral rights

In Bosnia and Herzegovina, State powers are divided by ethnic lines and the constituent peoples are given a clear advantage (for example, on the State level : the House of Peoples; the Chair and Deputy Chairs of the House of Representatives; the Presidency - see Articles IV and V of the BiH Constitution). Citizens not belonging to these constituent peoples risk being excluded from representation in the decision-making process. Provisions on the political representation of national minorities in the legislative and executive bodies at all levels are therefore of the utmost importance. Representation of minorities in the judicial bodies is also important, in order to ensure their appearance of impartiality.

The Draft Law, in its Articles 19 to 22, contains the principles of (a) the proportional representation at the State, entities, cantons, cities and municipalities level, of the numerically most significant national minorities and (b) of a given number of representatives for the other minorities. The manner of election of the representatives is to be set out in the relevant election laws.

The Draft Law should, however, specify:

- a) whether the right to elect special representatives of the minorities is coupled with the right of persons belonging to national minorities to be elected as such;
- b) whether members of national minorities are granted the right to elect special representatives in addition to the general and equal right to vote for the members of the relevant bodies of authority (double vote system: which however would be contrary to the principle of “one man one vote”);
- c) (if the system of the double vote is accepted) the impact of the outcome of the elections on the fixed number of seats to be allocated to persons belonging to national minorities (in particular, what if a candidate belonging to a national minority gets the number of votes required for a seat, but the allocation of a seat to him or her would exceed the number of seats proportionally allocated to the minority concerned?)

18. Freedom of religion

Although under Article 1 of the Draft Law the Bosnian authorities “respect and protect, preserve and develop” .. the religious identity of each member of the national minorities” and although Article 4 allows self-organization with a view to protecting, *inter alia*, religious “freedoms, rights, interests and needs”, the Draft Law does not contain any explicit provision

on freedom of religion. This is quite surprising in the Bosnian context, where the distinguishing feature of the ethnic identity of the three constituent peoples is religion more than the language.

The Rapporteurs consider that a specific provision on the freedom to manifest one's religion and to establish religious institutions, organisations and associations must be included in the Draft Law.

19. Discrimination

The Draft Law should contain, either in Articles 1 or 2, or in Article 5 paragraph 2, or in a separate provision among the first articles of the draft referring to Article II, Item 4 of the Constitution of BiH, a provision explicitly guaranteeing equality of treatment of members of national minorities in respect, in particular, of the three "constituent peoples", as well as a general prohibition of discrimination on the basis of belonging to a minority. It should further contain a provision expressly allowing for and guaranteeing affirmative action to the extent required to bring members of national minorities into a substantively equal position as compared to the members belonging to one of the three "constituent peoples".

20. Textual amendments

Finally, certain merely textual amendments are proposed:

Throughout the Draft Law, "members of" should be replaced by "persons belonging to" national minorities.

In Article 2, read as follows: "the rights and freedoms of persons belonging to these minorities"

In Article 4, delete "social" (it is repeated twice);

In Article 8, read: "rights pertaining to persons belonging to national minorities pursuant to this Law"

In Article 9, read as follows: ... constitute the majority, they shall respect ...

In Article 10, read as follows: "in accordance with the applicable regulations"

In Article 14, read as follows: "...represent an absolute or relative majority, they be enabled"

In Article 20, read as follows: "...participating in the population of the entity"

In Article 25, read as follows: "...their regulations on the rights of persons belonging to national minorities"