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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**(VENICE COMMISSION)**

**COMMENTS**

**ON THE DRAFT LAW<sup>1</sup> ON EXERCISE OF RIGHTS  
AND FREEDOMS OF NATIONAL AND ETHNIC MINORITIES  
IN MONTENEGRO**

**by**

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<sup>1</sup> This draft is just a working document.

1. The draft text of the Law on exercise of rights and freedoms of national and ethnic minorities presents a structure which reminds us - with regard to the arrangement of the matters - the structure of the Framework Convention for the protection of national minorities. Also the content of the provisions bears a striking similarity to this act. For instance, - as it happens with the FCNM - it provides for the protection of some rights and freedoms which should be already protected in the States which are parties to the European Convention on human rights, as Montenegro is. But the draft is different from the FCNM as far as it is aimed at protecting not only the individual rights of the persons belonging to national minorities but also the collective rights of the national minorities. As a matter of fact, from this last point of view the text of the article 1 (but see also articles 9 and 12 ) looks ambiguous because it refers to accepted rules of international law and ratified international treaties, while it is generally accepted that the international law is mainly, if not exclusively aimed at protecting the personal position of the persons belonging to the national minorities.

2. Sometimes this reference does not have apparently a normative content as in article 13, where the text pays lip - service to the protection of the collective rights, while the aims and purposes of the provision may be got directly through the exercise of individual rights of expression (and association). The connection between this article and the following articles 14 and 28 is evident, but it is also evident that, according to article 14, the establishment of institutions, societies, associations and non governmental organisations, depends on the exercise of the individual right of association, and even the same article 28 does not offer new suggestions on this point, while connecting the activity of the associations with the activity of the public authorities. The same remark can be made with regard to articles 16 and 17, and some of the following articles. But it is also true that, for example, article 16 provides for the recognition of the language of national minority as an official language , article 18 links the adoption of special measures of protection in the field of the education to the presence on a qualified number of students, and article 22 speaks about the setting up of educational institutions by the national minorities, and all of these rights have - therefore - a collective dimension.

3. Moreover there is another similarity of the draft to the FCNM. A great deal of its provisions have only programmatic content. Even when they are dealing with individual rights, they are not always directly applicable to the social life's relations. This is the case of the second and third alinea of article 13, of the second part of article 14, of article 16 which requires a legislative implementation, of article 17 which is leaving a large discretion to the public enterprise Radio-television Montenegro, of articles 18 - 26 which in different ways refer to other authorities the task of carrying out the aims and purposes of the specific measures of protection provided for. But very frequently these provisions don't state the guidelines about the modes and ways of their implementation: therefore, they offer only a very vague frame to the choices which shall be made by other authorities, that is by the legislator or administrative and local bodies.

4. From this point of view the provisions of the third part of the draft acquire a special relevance as far as they deal with the protection of the rights before the judicial authorities and in the decision - making processes. Two different systems of protection are provided for. On one side, the judicial bodies and the Constitutional Court are entrusted with the task of guaranteeing what article 47 defines the "standard court protection", to which national minorities and their members are entitled in case of violation of the rights stipulated in this law and others. On the other side, according to article 46, the Executive authorities of the Republic are in charge of the policy for development and protection of the rights of national minorities. But this last provision has to be read in connection with those articles of the second part of the draft which deal with

the establishment of the Councils of the national minorities and the participation of the minorities in the relevant decision making processes. The political dimension of the protection is obviously connected with the programmatic content of many provisions of the draft which cannot be directly implemented by the judicial authorities and require the intermediation of acts of other authorities.

5. At this point it could be useful examining the provisions of the draft concerning the judicial protection of the minorities rights, that is articles 47 and 48. The draft is dealing with the ordinary judicial protection, on one side, and with the lodging of constitutional complaints to the Constitutional Court. Apparently both the individual persons and the Councils which every minority is allowed to establish are allowed to avail themselves of this two ways of protection. But on this point the provisions of the draft look very confusing and it is difficult to understand them correctly.

6. First of all, it is not clear if the individual complaints are allowed to deal with the violations of individual rights or if a person belonging to a national minority may also complain about the violations of the collective rights as far as his/her personal position is concerned. Article 48 expressly allows the Councils of the national minorities to lodge a constitutional complaint to the Constitutional Court when are affected not only the rights of national minorities but also the rights of their members. Are the Councils allowed to submit complaints dealing with the individual position of the persons belonging to the national minorities even to the ordinary judiciary?

7. An important point is the qualification of the constitutional complaints. The first part of article 48 entitles anyone to lodge a constitutional complaint to the Constitutional Court for establishing both the constitutional basis and the legal basis of an act which violates the rights "stipulated by this law". According to the second alinea of article 48 a Council is allowed to lodge a constitutional complaint to establish both the constitutional and the legal basis of a law or of a general act of the government. In all these cases the yardstick of the judgement could be other Constitution or other legislative acts.

8. Apparently only the Councils are allowed to complain about the conformity with the Constitution or with the law of the statutes or of the general acts of government authorities. But both individual and Councils' complaints may be based on both constitutional and legal provisions: therefore is not easy distinguishing the complaints which may be submitted to the Constitutional Court from those which may be submitted to the ordinary judges. Perhaps we can say that the complaints of the Councils are restricted to acts of the government authorities, while such a limitation is not provided for the individual complaints both by the second alinea of article 47 and by the first alinea of article 48.

9. Moreover, a Council's constitutional complaint is also provided for when an individual act of a government authority affects the rights of a national minority and the protection of the ordinary courts is not granted. An analogous provision of the second alinea of article 47 allows also a person belonging to a national minority to lodge a constitutional complaint to the Constitutional Court "if no other judiciary protection is provided". We could draw the conclusion that a kind of subsidiary rule applies in the case of the lodging of the constitutional complaints by the Councils and by the persons belonging to the national minorities: their submission is allowed when other judiciary protection is missing. But in any case the question about the distinction between the basis of the individual complaints to the ordinary judges and those to the Constitutional Court is not settled. And we could also put the

question whether other judiciary protection is considered missing when there isn't any provision of a judiciary protection with regard to the matter at stake, or only when the person or the Council concerned have exhausted all the judicial protections provided for by the law. But, if we stick to the first branch of the alternative, can we imagine that some rights are deprived of an ordinary judicial protection in the legal order of a State which, on one side, is a member to the European Convention on human rights, whose article 13 requires the judicial protection of all the rights which it covers, and, on the other side, adopted the Charter on human and minority rights and fundamental freedoms whose article 18 guarantees to everyone the right to a complaint or other legal remedy against decisions concerning his/her rights?

10. On the other side, the programmatic nature of many provisions of the draft could imply that statutes, general acts and individual acts of the government authorities will be frequently accused to violate the minorities rights as far as the implementation of the draft is at stake. But in this case we have to realize that the drafted law shall be a yardstick of the decisions of the Constitutional Court. Which shall be its position in the hierarchy of the sources of law of the legal order of the Republic of Montenegro?

11. A clear distinction between the individual rights and the collective rights is also missing. Apparently are collective rights, that is rights of the national minorities as such, many of the rights provided for by article 26 and the following ones. The rights to the use of national symbols, to the celebration of minority historical dates and events, to a parliamentary and municipal representation, to a fair representation in public authorities and in the public decision-making processes are certainly rights which have a constitutional dimension even if possible complaints based on them could imply the use of ordinary legislation as a yardstick of judgement. On the other side, is it advisable entrusting the Constitutional Court with the power of judging cases which regard not only administrative acts of the government authorities but also activities of minor local authorities? The constitutional qualification of the competence of the Court should require that the complaints which have to be submitted to this body are clearly distinguished from those which can be submitted to the ordinary judges.

12. As a conclusion of the analysis of the provisions concerning the judicial protection of the rights, it could be convenient suggesting the redrafting the first articles of the third part of the draft in such a way of avoiding the present confusion. The draft should clearly distinguish the cases

- a) when a person is allowed to lodge a complaint to the ordinary judges,
- b) when a person has to lodge his/her complaints to the Constitutional Court, and
- c) if and when a person is allowed to lodge a complaint for the protection of the collective rights
  - c') to the ordinary or
  - c'') to the Constitutional Court; moreover the draft shall clarify
- d) if and when the Councils are allowed to lodge complaints in view of the protection of collective rights
  - d') to the ordinary judges or
  - d'') to the Constitutional Court.

13. Not only the judges are entrusted with the task of protecting the rights of the national minorities. The draft provides also for the protection of those rights by political and local authorities. At the core of this second branch of the system of the protection of the minority rights are the provisions dealing with the establishment of the Councils of the national

minorities, which are elective bodies which can be created to promote freedoms and rights of the national minorities. Their election shall require the registration of the members of the minorities (article 39). This arrangement arises some questions about the identification of the persons who have to be registered and about the protection of the right to privacy of the persons who shall be registered. A consolidated "jurisprudence" of the Advisory body for the implementation of the FCNM requires a lot of attention on these points. Shall the registration be made taking into account the will of the people concerned, or shall it require specific, objective criteria to identify the persons belonging to a national minority? How shall the individual right to privacy be guaranteed? On the other side, only the machinery of the registration allows a correct functioning of an elective system of appointment of the members of the Councils. A fair balancing of the interests at stake has to be made by the legislator. It cannot be left to the discretion of the Council themselves.

14. The rules concerning the election, the organization and the functioning of the Councils shall be adopted by the Councils themselves: at least for the electoral rules, and not only because of the justification just offered, it would be more advisable to entrust with this task the parliamentary legislator who is only in the position of guaranteeing the equality of treatment and the fairness of the procedure. We have to keep in mind that we are dealing with constitutional rights. Same conclusions should be drawn with regard to the implementation of articles 29, 30, 31 and 35, while articles 32, 33 and 34 require the adoption of autonomous acts of the concerned authorities.

15. The implementation of all these provisions should require a judgement of the Constitutional Court (or of the ordinary judges too?) when there were complaints about the violations of the concerned collective rights. Obviously the complaints shall deal with doubts concerning not only the compliance of the relevant statutes and autonomous regulations with this law at the moment of its implementation, but also with the compliance of the competent authorities with the substantial content of the provisions adopted in conformity with the law during the relevant decision making processes. The draft should be more precise on this point, even if the present text already allows a positive conclusion about the admissibility of the described complaints. Who shall be in the position of lodging a constitutional complaint if the relevant Council was not established or if the question regards the establishment of the Council itself? We come back to the problem of the holder of the right to submit complaint concerning collective rights.

16. Articles 36 and 49 touch the parliamentary procedure of adoption of the statutes. If this matter is reserved to the Constitution or to the internal parliamentary regulations, the law should not be allowed to rule on these points. But, perhaps, the authorities of the Republic of Montenegro want to adopt it by a constitutional act. This solution should be preferable also taking into account the adoption of the law as a yardstick in the constitutional judgements..