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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.

## I. General comments

1. In elaborating these comments, the following points of reference were used *inter alia*: the international and European legal instruments regulating the protection of national minorities, especially the Council of Europe Framework Convention for the Protection of National Minorities, and also recent relevant documents (for example, the Recommendation 1623/2003 of the Parliamentary Assembly of the Council of Europe “Right of national minorities”), as well as relevant domestic legal Acts, the most important of which being the constitutional Charter of the State Union of Serbia and Montenegro, the Charter on Human and Minority Rights and Fundamental Freedoms of Serbia and Montenegro, and the Law on Protection of Rights and Freedoms of National Minorities of the Federal Republic of Yugoslavia (still in force in Montenegro).

2. As a general assessment, the draft Law is in line with the points of reference mentioned above.<sup>2</sup> Sometimes the draft even goes beyond the standards included in the international documents mentioned in paragraph 1 of these comments.

3. The draft uses an *abundant terminology* that might create some difficulties in the future implementation and even certain consequences that, in my view, should be avoided. Thus, the draft uses the terms “national minorities”, “ethnic minorities”, “minority nations”, “nationalities”. It is true that Article 47 § 5 of the Charter on Human and Minority Rights and Civil Liberties authorises the use of other terms in addition to that of “national minorities”. A certain consistency should however be ensured and the terminology from the Framework Convention for the Protection of National Minorities should be considered as a landmark.

4. The term “minority nation” appears to be an inaccurate translation of the original “*manjinski narod*”, that is “minority peoples”. The latter term seems more acceptable than the former, although both may infer that national minorities can exercise the right to self-determination, which is not in accordance with International Law. The term “nationality” (in its ethnic sense) should also be avoided, as in current International Law it is used to designate “citizenship”.

5. As far as the *scope of the protection* of the draft, as defined in article 1, the text makes reference both at “persons belonging to national minorities” and at “national minorities” as such. One may note that, although the Framework Convention for the Protection of National Minorities, for reasons of brevity, makes use of the short formulation “national minorities” the text of the Convention refers to “persons belonging to national minorities”, in order not to infer that it would acknowledge “collective rights”<sup>3</sup>. *Therefore, in my view, the draft Law should refer only to “persons belonging to national minorities”.*

6. It is a fact that the 2003 Charter on Human and Minority Rights and Fundamental Freedoms of Serbia and Montenegro (article 47), and the Law on Protection of Rights and Freedoms of

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<sup>2</sup> That is why the following comments will focus, in principle, only on those articles or aspects that seem problematic and need clarifications, modifications or improvement. Exceptionally, the comments underline solutions set forth in the draft, which could constitute good examples for other future similar pieces of legislation.

<sup>3</sup> “Collective rights imply that persons belonging to national minorities shall, directly or through their elected representatives, take part in decision taking process or decide on issues related to their culture, education, information and the use of language and script, in accordance with the law”.

National Minorities of 2002 (article1) set forth the notion of “collective rights”, but the recognition of such “collective rights” of national minorities goes beyond the present stage of positive International Law.<sup>4</sup> In this respect, I fully share the comments of paragraph 26 of the opinion of Mr. Jan Helgesen on the (draft) Charter on Human and Minority Rights (Opinion No. 234/2003, p.7): “minority rights, as part of human rights, in International Law are accorded only to individuals who may exercise such rights also in community with other individuals” belonging to the same minority.

7. Moreover, both the Charter on Human and Minority Rights and the Law on Protection of Rights and Freedoms of National Minorities use, in all articles, only the formula “persons belonging to national minorities”.

8. The *definition of national minority* (article 2 of the draft) should be *reviewed* from two points of view.

9. Firstly, the reference to the fact that the national minority is a “*group...that is a part of the nation from some other Kin-State...*” should be eliminated: it restricts from considering as national minority those minorities which do not have a Kin-State - such as the Roma minority, and does not correspond to the current European concept of “nation”, which is the “civic nation”, and not the “ethnic nation”.<sup>5</sup>

10. Secondly, the definition excludes from its scope the persons not having the citizenship of the Republic of Montenegro (article 2) and also the refugees, displaced persons and persons who do not hold citizenship (article 3). The exclusion of non-citizens from the scope of protection of this law is in line with the “Law on the protection of rights and freedoms of national minorities” of the former Federal Republic of Yugoslavia, which is applicable in Montenegro. In principle, despite some new tendencies in the doctrine, I support a definition of national minority which includes the condition of Home-State citizenship. However, taking into account the particular circumstances after the dissolution of former Yugoslavia and after the Kosovo conflict,

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<sup>4</sup> The Framework Convention on the Protection of National Minorities (hereinafter “*the Framework Convention*”), the Council of Europe’s main instrument of minority protection, does not recognize collective rights, but only the possibility of joint exercise of individual rights and freedoms (see Articles 1 and 3 para.2 of the Framework Convention and paras.31 and 37 of the Explanatory Report). Similarly, Article 27 of the International Covenant on Civil and Political Rights provides that “persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their culture (...)”. The Human Rights Committee General Comment No. 18, 3.1 and 6.2 makes clear that this article “relates to rights conferred on individuals as such” and protects “individual rights”. The 1990 OSCE Copenhagen document refers to “persons belonging to national minorities” when addressing their rights and further states that “to belong to a national minority is a matter of a person’s individual choice and no disadvantage may arise from the exercise of such choice”. The UN Declaration on the Rights of Persons Belonging to National or Ethnic or Religious and Linguistic Minorities (1993) also refers to “persons belonging to...” and in its article 3(1) states that “Persons belonging to minorities may exercise their rights, including those set forth in the present Declaration, individually as well as in community with other members of their group, without and discrimination”.

<sup>5</sup> It is to be reminded in this respect that, following the recommendations of the European competent bodies, especially of the European Commission (the Non Paper of December 2002 “Assessment of the compatibility of the revised draft Law on Hungarians Living in Neighbouring States with European standards and with the norms and principles of international law (findings of the Council of Europe’s Venice Commission) and with EU Law”), the amendments of June 2003 of the said Law on Hungarians...excluded, inter alia, from the text of that piece of legislation the reference to the “Hungarian nation as a whole” (the “ethnic nation”), that was considered to create a political link, in conflict with the sovereignty and jurisdiction of the neighbouring State.

according to which the citizenship status of many persons was not yet regularised, a more flexible approach is exceptionally necessary.

11. Article 3 should include the appropriate references to the applicable international instruments.<sup>6</sup>

## II. Comments on articles

12. As far as *article 4* of the draft is concerned, I think it should find a better place at the beginning of Chapter III of the Law (“Protection of rights”) and I would suggest that para.2 become the first paragraph, and para.1 become the second one.

13. As far as *article 5* is concerned, I suggest to replace the word “nationality” (assuming the translation is accurate) with “belonging to a national (or ethnic) minority” (see the above comments at point 3).

14. At the same time, I suggest the inclusion of a provision stating the right of persons belonging to a national minority to freely chose the *denomination* of the national minority of their choice, *without any interference or influence from the authorities*. This could also constitute an obligation, provided in Chapter III (“Protection of Rights”), for the authorities to respect the self-denomination by the persons belonging to a certain national minority.

15. I note with satisfaction that *article 10*, setting forth the possibility for the Republic of Montenegro to conclude agreements on protection of national minorities with other States, is in line with article 18 of the Framework Convention, as well as with the Conclusions of the Venice Commission’s Report on the preferential treatment of the national minorities by the Kin-State (October 2001), which highlight the bilateral (consensual) way in protecting kin-minorities.

16. Regarding *article 12*, the text of para.1 is too general.<sup>7</sup> However, the regime of restriction of the rights of persons belonging to national minorities shall not differ from the similar regime regarding other human rights, and shall be in conformity with the relevant constitutional provisions. It is to be noted that article 19 of the Framework Convention allows only for those limitations, restrictions or derogations which are provided for in international legal instruments, in particular ECHR. At the same time, para.2 and para.3 of article 12 of the draft Law set forth “*suspensions or restrictions*” in case of “war, state of immediate danger from war or state of emergency”. The Charter on Human and Minority Rights of Serbia and Montenegro and stipulates, on the other hand, in article 6, the possibility for “*derogation* from minority rights” in case of “official declaration of the state of war or other public emergency” etc.

17. In the light of the above mentioned, the text of article 12 seems to need further clarifications.

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<sup>6</sup> It should be reminded, in this sense, that according to para.6 of the PACE Recommendation 1623/2003 “Rights of National Minorities”, “...the Assembly considers that the States parties do not have an unconditional right to decide which groups within their territory qualify as national minorities in the sense of the Framework Convention”.

<sup>7</sup> “Entitlement to the rights for national minorities and persons belonging to national minorities stipulated by this law can not be restricted by any act or action by any authority except in the cases where the law prescribes otherwise”.

18. Concerning *article 17*, the text should not, as a matter of principle and in order to avoid any preference amongst the national minorities, make reference to a specific minority language (“Albanian” should be replaced with “minority”).

19. As regards *article 18*, it should be noted that article 14 of the Framework Convention does not set forth *financial conditions* in connection to the exercise of the right to education in minority language. Consequently, the wording “depending on the financial means the Republic can afford” should be eliminated.

20. It is to be underlined that *article 29* provides for additional number of seats in the Parliament, determined “in proportion with the share of the concerned national minority in the total population number taken from the latest census in the republic and from the ballot results for special minority candidate list”.

21. It results from the text, that besides the number of seats obtained by proportional vote, the national minorities have automatic representation, in accordance with their percentage in the total number of population, as resulting from the census or ballots. Automatic representation in Parliament is to be welcomed, as it is in full conformity with the Recommendation 1623/2003 of PACE (para.11 v): “The Assembly calls on... the States parties... to *ensure* parliamentary representation of minorities”<sup>8</sup>.

22. Consequently, the manner the census is conducted becomes important, and the draft law should set forth a special provision guaranteeing the impartiality of its procedure, as well as its accuracy.

23. The provisions of *article 30* should also be commended, as it allows for automatic representation of national minorities in local self-governments, in the municipal assemblies.

24. The same goes for *article 31*, which sets forth automatic representation of national minorities in the courts of law. This provision is to be read in the light of Article 73 of the Constitution of Montenegro and Article 21 of the Law of the FRY, that is to say that it should mean that such representation must be guaranteed in respect of the policy of recruitment of judges.

25. As far as *article 38* is concerned, as a matter of principle, all support from abroad which aims at protecting, preserving and developing the cultural and linguistic identity of a certain national minority should be *exempted from any tax or custom duties*. The text of this article should be modified accordingly.

26. Taking into account the importance of the competences of the Council of a national minority, as provided in articles 40-41, the real *degree of representation* of the Council is of utmost importance.

27. *Article 45* mentions, among other domestic institutions in charge with the protection of human rights, the *ombudsman*. The draft could entrust a deputy of the ombudsman with the exclusive competence in the field of minority rights protection.

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<sup>8</sup> There is only a limited number of member States of the Council of Europe (yet), that guarantee (automatic) representation of national minorities to the Parliament (for instance, Romania, Croatia, Austria).