Strasbourg, 3 June 2004

Restricted
CDL(2004)038
Engl. only

Opinion no. 270 / 2003

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

ON THE REVISED DRAFT LAW ON EXERCISE OF THE RIGHTS AND FREEDOMS OF NATIONAL AND ETHNIC MINORITIES

IN MONTENEGRO

by

Mr Sergio BARTOLE (Substitute member, Italy)

ADDITIONAL NOTES ABOUT THE LAW ON EXERCISE OF RIGHTS AND FREEDOMS OF NATIONAL AND ETHNIC MINORITIES
(taking into account the new draft)

1. If we compare the draft law submitted to the Venice Commission with the main constitutional documents of the State Union of Serbia and Montenegro and the Republic of Montenegro, we have to deal with two different questions. The first question regards the scope of the competence of the Republic of Montenegro in the matter (A), and the second one concerns the compatibility of the normative content of the draft with the constitutional rules providing for the protection of the minority rights (B). It could be raised the question whether art. 1 of the draft, when referring to the bases of the new legislation, correctly limits the quotation to the Constitution of the Republic of Montenegro and to the generally accepted rules of international law and ratified international treaties. It would be advisable mentioning also all the relevant constitutional documents of the State Union. In any case, it cannot be denied that the present draft shall comply with the Constitutional Charter and with the Charter on human and minority rights and civil freedoms of the Union. Moreover we have to keep in mind that the draft is aimed at the adoption of an ordinary law because the Constitution of Montenegro doe not provide for the existence of constitutional laws subordinate to the Constitution but superior to the ordinary legislation.

2. A) As a matter of fact, the Constitutional Charter of the Union provides for the adoption of the Charter on human and minority rights and civil freedoms, "which consists an integral part" of the Constitutional Charter itself (art. IX). But in the same article is clearly that "the member states shall effect, provide and protect human minority rights and civil freedoms in their territory". Therefore there is a competence of the two constituent entities of the Union in the matter. It could be said that it is subordinated to the constitutional legislation of the Union because it has to be exercised in view of its implementation. But it is evident that, as far as the legislation of the member states does not conflict with the provisions of the central legislation, the rules of the two Republics are valid.

3. This principle is reiterated by the Charter on human and minority rights and fundamental freedoms of the Union, where the member states are entrusted with a primary function in the matter which apparently allows them to provide for the implementation of the Charter without a previous intermediation of an ordinary central legislation. This consequence may be easily drawn from the last alinea of art. 2 of the Charter according to which "human and minority rights guaranteed by this charter shall be directly regulated, provided for and protected by the constitutions, law and policies of the member states".

4. Our conclusions are confirmed by the Constitution of the Republic of Montenegro where many provisions (art. 9 and 67-76) deal with the protection of the minorities. These provisions are detailed and specify the content of the protection: a choice which is apparently correct as far as the Charter of the Union deals with the matter in very general terms providing for the grounds and framework of the rights, the prohibition of discrimination and forcible assimilation and instigation of racial ethnic hatred, the promotion of living conditions and the development of a spirit of tolerance and establishing only in a summary way the freedom to express national identity, the rights to maintain identity, to assembly and to establish unhindered relations with "compatriots" staying outside the Union.

5. On the other side, also the provisions of the Constitution of Montenegro require an implementing legislation. Therefore, the law whose draft is submitted to the Commission, not only falls in ten competence of Montenegro but is constitutionally necessary.

6. B) On the basis of the previous consideration we have now to look at the normative content of the draft. Some provisions of the document could arise questions. This is not the case for the rules directly guaranteeing collective minority rights because art. 47 of the Charter of the Union explicitly provides for the protection both of individual and of collective rights of persons belonging to national minorities. Moreover the new draft correctly enlarge the scope of the definition of the concept of minority cancelling any reference to possible kin-States. And its art. 5 offers a preferable drafting of the right of declaring his/her "nationality" freely which is given to every citizen.

7. But the following provisions deserve to be dealt with separately:
   Art. 9 (art. 10 of the old draft) allows the Republic to sign international agreements on the protection of the national minorities with other states: it does not conflict with the Constitution of the Union as far as according to art. X of this document "the member states can maintain international relations, conclude international agreements…. if it is not in opposing the competences of Serbia and Montenegro and interests of the other members state".

8. Art. 10 of the new draft should clarify one point: the Government is not allowed to adopt the Strategy of the Policy for Minorities in view of substituting it for a legislative act which is required by the constitutional rules.

9. Art. 14 (art. 16 of the previous draft) is apparently conflicting with art. 9 of the Constitution of Montenegro, where the recognition of the status of official language is restricted to the languages of national minorities and ethnic groups which in the municipalities of the Republic are the majority or a substantial number of the population. The draft is clearly going further than this limit, when allows the recognition of the status of official language eve to the language of groups "which account for 5% of the total population". It should be clarified whether the expression "official language" has a meaning different for the meaning of the expression "official use of the language". The third alinea of the article identifies the content of the official use of the language which does not explicitly imply the status of official language for the minority languages. For instance, which language has to have the preference if there are conflicts between the documents written in both the documents? Apparently, the following art. 32 distinguishes the official language from the languages of the minorities whose use is ruled by art. 14.

10. Art. 27 (art. 29 of the old text) conflicts with art. 73 and 77 of the Constitution of Montenegro which provide for minority seats only in public services, state authorities and local self-government and not in the republican Parliament.

11. Both art. 14 and art. 27 enlarge the rights of the minorities. Is it compatible with the constitutional provisions? We can answer "yes" as far as rights of other people are not curtailed and the measures which are provided for are covered by the second alinea of art. 6 of the draft. But it could be said that this alinea does not regard matters explicitly dealt with by the following articles.

12. Art. 34: I suggest "the deliberation about the proposal cannot be put again on the agenda.".

13. Art. 45 and 46 (art. 47 and 48 of the old text) are apparently compatible with the constitutional provisions dealing with the judicial protection of the rights as far as art. 113 and 114 of the Constitution of Montenegro allows the introduction of constitutional complaints for violations, by individual enactments or deeds, of the freedoms and rights of man and citizen as prescribed by the constitution, whenever this protection is not within the competences of the federal Constitutional Court and whenever some other legal remedy is not prescribed. In the previous draft the constitutional complains to the Constitutional Court against laws affecting the minority rights were allowed to the Councils of national minorities: it was a novelty which is not provided for by the constitutional rules in the matter. This provision was cancelled in the new draft. The Councils are allowed only to "lodge a petition to the President of Republic requesting that such a law is not promulgated". The minorities are deprived of a judicial protection, but the solution is correct as far as the proposed law will not get the status of a constitutional law. In any case the entrustment of the right of submitting petitions to support the minority rights is coherent with the role of the Councils, even if art. 76 of the Constitution of Montenegro provides for the establishment of a Republican Council for protection of rights of national and ethnic groups, but it does not mention the councils of national minorities. The problem is still open about the constitutional compatibility of the constitutional complaints provided for by the second alinea of art. 45 and the first alinea of art. 46: is it correct entrusting the Constitutional Court with the power of deciding complaints which will not be necessarily based on constitutional provisions, as it will happen when the complains is based on the ground of violation of the present draft? It could be admissible only if we think that in any case this complaints will imply a reference to the constitutional provision in the matter.

University of Trieste, April 30th 2004. (prof. Sergio Bartole)