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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**(VENICE COMMISSION)**

# OPINION

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

# IN MONTENEGRO

**Adopted by the Venice Commission**
**at its 59th Plenary Session**
**(Venice, 18-19 June 2004)**

**on the basis of comments by**

**Mr Bogdan AURESCU (Substitute member, Romania)**
**Mr Sergio BARTOLE (Substitute member, Italy)**

## *I. Introduction*

*1. In November 2003, the Minister for the Protection of the Rights of National and Ethnic Groups of the Republic of Montenegro requested the Venice Commission to provide its expertise on the draft "Law on exercise of the rights and freedoms of national and ethnic minorities" (CDL(2004)016).*

*2. Messrs Sergio Bartole and Bogdan Aurescu were appointed as rapporteurs. Their preliminary comments (CDL(2004)017 and CDL(2004)018) were presented to the Commission at its 58th Plenary Session (12 and 13 March 2004).*

*3. A working meeting took place in Podgorica on 16 March 2004, which was attended by the members of the Montenegrin Working Group on the draft law, representatives of minorities in Montenegro, Mr Asbjørn Eide, member of the Advisory Committee on the Framework Convention for National Minorities and Mr Bogdan Aurescu. Following the meeting, a revised draft law was prepared in the light of the discussions. Such draft (CDL(2004)040) was submitted to the Venice Commission for further comments.*

*4. The present opinion, which was drafted on the basis of the comments by the Rapporteurs (see CDL(2004)037 and CDL(2004)038 respectively), was adopted by the Commission at its 59th Plenary Session (Venice, 18-19 June 2004).*

## II. BACKGROUND

5. Montenegro - one of the two Republics forming the State Union of Serbia and Montenegro ("State Union") – is one of the smallest European and Balkan states. Despite its small size, the population of Montenegro is extremely heterogeneous. According to the preliminary results of the latest census (November 2003), of the people living in Montenegro 40.64 % declared themselves as Montenegrins and 30.01% as Serbs (in 1991 the respective figures were 69% and 9%). Of the remaining, 9.41% stated that they were Bosniaks, 4.27% Muslims, 7.09% Albanians, 1,05% Croats, 0.43% Roma, and 1.25% "others". 4.29% did not indicate a national/ethnic determination (answering was not compulsory), and for 1.57% no data were available[1]. It should also be noted that, of an overall population of some 670,000 people, about 60,000 persons are estimated refugees or displaced persons arrived essentially from the neighbouring Bosnia and Herzegovina and Kosovo.

6. The issue of the protection of minorities in Montenegro is not a new one. One of the major constitutional problems of the former Yugoslavia, of which the Republic of Montenegro was once part, when it was founded in 1946 was precisely to find a solution to the "nationality question" inherited from the past.

7. It should be noted at the outset that in local language, there exists a difference between the terms "nationality" and "citizenship". The term "nationality" is generally used in the sense of national identity and has thus a different meaning from that prevailing in Western Europe, where it is synonymous with citizenship. The construction of a supranational "Yugoslav" identity, most forcefully pursued during the 1950s, relied on the idea of "brotherhood and

[1] OSCE Mission to Serbia and Montenegro, Background Report, 2003 Montenegrin Census – preliminary results.

unity of peoples and nationalities ("*naroda i narodnosti*")"[2], an idea that stayed anchored in the Constitution of former Yugoslavia until its dissolution. Under the Constitution of 1963, a kind of hierarchy of "nationality" groups was created, within which different groups were categorized and according to which they were granted certain rights.

8. The first category was that of "*peoples*" (*narodi*) of former Yugoslavia: six peoples[3] had a national home based in one of the republics and a constitutional right to equal political representation[4]. The second category was constituted of ten officially recognized "*nationalities*" (*narodnosti*)[5], which were guaranteed a considerable language and cultural autonomy. A third category, the "*other nationalities and ethnic groups*"[6], comprised small European minorities who were also recognized certain rights.

9. The dissolution of the former Yugoslavia changed the factual situation and legal position of minorities in Montenegro, also by adding so-called "new minorities", that is those who lost their status of "peoples". This change is clearly visible through the differences in the results of the two last censuses, of 1991[7] and 2003.

10. In such a context, the existence of a modern and well-balanced constitutional and legal framework guaranteeing protection of minorities in Montenegro is of a particular importance.

## III. ANALYSIS OF THE DRAFT LAW

### A. Position of this law in the hierarchy of norms

11. At present, the issue of minority protection in Montenegro is regulated by several legal instruments.

12. The Constitutional Charter of the State Union of Serbia and Montenegro ("Constitutional Charter") states that "*The Charter on human and minority rights and civil freedoms /.../ represents an integral part of this Charter. The member states shall effect, provide and protect human and minority rights and civil freedoms in their territory*" (Article IX). The Charter on human and minority rights and civil freedoms ("the Charter") was adopted in January 2003.

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[2] More often translated as "nations and nationalities" in its ethnic sense.

[3] Croats, Macedonians, Montenegrians, Serbs, Slovenians and Muslims (since 1971).

[4] Muslims from Bosnia and Herzegovina formally obtained nationality status in 1971. Since then, the term "Muslim" written with an initial capital designates a person's nationality while the term "muslim" written with a small letter refer to a member of a religious community.

[5] Albanians, Hungarians, Bulgarians, Czechs, Italians, Jews, Romanians, Ruthenians, Slovakians and Turks.

[6] This category included Austrians, Germans, Greeks, Polish, Roma, Russians, Ukrainians, and Vlahs.

[7] In 1991, of population of Montenegro, 61,86 % declared as Montenegrians, 14,57% as Muslims, 9,34% as Serbs, 6,57% as Albanians, 5,42% as Roma and 1% as Croats.

13. In its Article IX, the Constitutional Charter establishes the principle of direct applicability of the provisions of the international agreements on human and minority rights and civil freedoms ratified by the State Union. The FRY ratified the Framework Convention for the Protection of National Minorities ("Framework Convention"), in May 2001. The State Union ratified the European Convention on Human Rights in January 2004. These international agreements, as well as the generally accepted rules of international law, have priority over national legislation (Article X.3).

14. The Constitution of Montenegro of 1992 provides for a separate chapter on "Special rights of National and Ethnic Groups".

15. The Federal Law on the protection of rights and freedoms of national minorities ("Federal law"), adopted in 2002, is still valid for the territory of Montenegro.

16. The question of the competence of the Republic of Montenegro to legislate on this matter as well as the position of the draft law in the hierarchy of norms are hence very important and need be addressed.

17. Article 1 of the draft law refers to the "*Constitution of the Republic of Montenegro, generally accepted rules of international law, and ratified international treaties*".

18. The Commission strongly recommends that Article 1 of the draft law add reference also to the Constitutional Charter and the Charter of the State Union, as the draft law will have to conform to them. In addition, the Commission notes that the 1992 Constitution of Montenegro should have been brought in line with the Constitutional Charter and ratified international agreements of the State Union within six months following coming into force of the Constitutional Charter[8] (which expired in July 2003) but has not been amended to date.

19. In its Article IX, the Constitutional Charter states that "member states shall effect, provide and protect human and minority rights and civil freedoms in their territory". Furthermore, the Charter, which deals with minority rights in very general terms, entrusts the member states to ensure its implementation directly. The competence of Montenegro to legislate on this matter, and the need for the adoption of the draft law are therefore clearly established.

20. Most of the rights established by the draft law will be exercised in accordance with specific implementing laws. The Commission assumes that these implementing laws will be compatible with the general provision in the draft law. In this respect, the Commission notes that the draft law provides for the possibility of seeking an abstract review of acts allegedly violating the rights guaranteed by the draft law, by the Constitutional Court of Montenegro (Articles 45 – 46, see *infra*, Paras 62-68). In such cases, the draft law will presumably be a yardstick of the decisions of the Constitutional Court.

21. The Commission stresses in this respect the importance of the hierarchy of norms and the nature of the draft law. According to the Constitution of Montenegro, there is no category of "constitutional laws" superior to the ordinary legislation. The draft law will therefore be an ordinary law. Accordingly, in order for the Constitutional Court to be able to use it as a

[8] Article 20 of the Law on Implementation of the Constitutional Charter of the State Union of Serbia and Montenegro.

yardstick, in the Commission's opinion, it will be necessary that the law point out expressly that as the law aimed at implementing the Constitution, it should be given priority over ordinary legislation as regards minority protection in Montenegro, and also set out with some detail the guidelines that the secondary legislation will have to respect. The Montenegrin authorities could also consider addressing this important issue in the context of the constitutional revision process presently taking place in the country.

### B. Scope of application

a. The issue of terminology

22. The expression "national minority" became part of international law terminology during the era of the League of Nations. One may note that though it is today generally used as a reference term to designate minorities within a state, there is no a specific requirement dictated by the international law for it to be used by a State in guaranteeing rights concerning persons belonging to minorities at a domestic level[9]. This also appears to be the position of the Advisory Committee of the Framework Convention[10]. Ultimately, the term chosen by a given state should reflect on the one hand the wishes of persons concerned, and on the other hand the specific understanding of such terminology in the particular circumstances of the state in question.

23. The Venice Commission is aware of the heated debate that has taken place in Montenegro concerning the terminology to be used in the draft law.

24. The term "national minority" was used in the legal theory of former Yugoslavia in the first half of XX century. In the 1963 Constitution this term was replaced with the term "nationality" (*narodnost*), which remained in use until the very end of the former Yugoslavia. The new Constitution of the Federal Republic of Yugoslavia (constituted by Serbia and Montenegro), adopted in April 1992, reintroduced the term "national minority", while the Montenegrin Constitution, adopted only six months later, in October 1992, opted for the term "national and ethnic groups". Yet, following the political consensus signed on 1 September 1997 between the main political parties of Montenegro[11], it is the term "minority peoples"

[9] At the international level, the ICCPR uses the term "ethnic, religious or linguistic minority". At a national level, different terms are employed: in Austria and in Hungary, it is the term "ethnic groups", in Finland, the terms "minorities" and "racial group, group of a national or ethnic origin, or religious group" are employed, in Slovakia, the terms "national minority and ethnic group" are also used. It should be noted that the various terms used to designate a minority are largely synonymous. In some States, no specific term is adopted at all; this is the case in Denmark where the legislation speaks of the rights of the inhabitants of the Faroe Islands and of Greenland, (see the Venice Commission study of the practice of 26 European countries, CDL-MIN (1994) 005). Furthermore, Greece uses the term "religious minority", in "the Former Yugoslav Republic of Macedonia" Constitution and legislation it is the term "nationalities" that is employed (see the *Results of the exchange of information on the question to which groups the Framework Convention will be applied*, doc. DH-MIN (98) 4 Addendum I). The latter term is also used in the Slovenian legislation.

[10] "*…the applicability of the Framework Convention does not necessarily mean that the authorities should in their domestic legislation and practice use the term "national minority" to describe the group concerned*". (Advisory Committee of the Framework Convention, Opinion on Norway, 13 February 2003, ACFC/INF/OP/I(2003)03 para. 19).

[11] Social Democratic Party (SDP), Democratic Party of Socialists (DPS), Liberal Alliance of Montenegro and People's Party.

(manjinski narodi) that is most commonly used in that Republic. Such choice is most probably a consequence of the appearance of the so-called "new minorities" after the dissolution of the former Yugoslavia, i.e. those minorities that, within the former state, had enjoyed the status of constituent peoples (see *supra* Para. 8).

25. The draft Law uses several different terms, which might create some difficulties in the future implementation. Thus, while Articles 1 and 2 use the terms "national minorities", "ethnic minorities", "minority nations" and "persons belonging to them", most articles of the draft law refer systematically to "national minorities and persons belonging to national minorities" (while Articles 24, 36, 27 and 45 refer to "national minorities and their members").

26. Article 47 § 5 of the Charter and Article 2 § 2 of the Federal Law authorize the use of other terms in addition to that of "national minorities". A certain consistency should however be ensured. In the Commission's view, the terminology from the Framework Convention should be used as reference.

27. One may note that, although the Framework Convention, 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. Yet, the Parties to the Framework Convention do recognize the possibility of joint exercise of individual rights and freedoms[12].

28. The Charter (article 47[13]) and the Federal Law (article 1[14]**)** use the notion of "collective rights".

29. Several articles of the draft law provide for typically group rights; for example, establishing institutions, societies and associations in all fields of social life (Article 12), the recognition of the language of national minority as an official language in local self-governments in which national minority account for 5% of the total population (Article 14), or the adoption of special measures of protection in the field of education (Articles 16 to 21).

30. With regard to the issue of terminology, the Commission considers that each minority should have the right to freely choose its own self-nomination, without any interference from the authorities of the home-State. The solution adopted by the Charter and the Federal Law, providing that "u*nder the terms of this Law, all groups of citizens who consider or define themselves as peoples, national or ethnic communities, national or ethnic groups, nations or*

[12] See Articles 1 and 3 para. 2 of the Framework Convention, and paras 31 and 37 of the Explanatory Report. At the universal level, 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 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 Declarati*on, individually as well as in community with other members of their group, without and discrimination".

[13] "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".

[14] "This Law regulates the respect for the individual and collective rights guaranteed to the persons belonging to national minorities by the Constitution of the Federal Republic of Yugoslavia or by international agreements".

*nationalities, and who fulfil the conditions from [paragraph 1 of this Article], will be treated as national minorities"* seems to be the most appropriate one to be followed also by the present draft law. As to the revised article 2, as well as the rest of the draft law, they should refer only to the term "national minorities". In this respect, the Commission assumes that it is not the intention of Montenegro to introduce a hierarchy of categories within the "minorities" in Montenegro, and that whatever terminology will be used in the final draft, the legal status and the scope of the protection guaranteed to the persons concerned shall be the same.

b. Definition of minorities

31. There is, at present, no unanimously accepted definition of what a minority is. Of the specific criteria for determining whether a certain group is a minority or, indeed, whether it exists, citizenship is one of the most debated.

32. The definition provided by Article 2 of the draft Law excludes from its scope of application any persons not having the citizenship of the Republic of Montenegro, and also refugees, displaced persons and stateless persons (article 3)[15]. The exclusion of non-citizens from the scope of protection of this law is in line with the Federal Law, which is applicable in Montenegro, as well as with the Charter.

33. The Commission has recently had the occasion to express itself on the issue of the citizenship requirement with regard to the draft law on minorities of Ukraine. While recalling that traditional international law approach is to include citizenship among the objective criteria of the definition of "minorities", the Commission also noted that "*a new, more dynamic tendency to extend minority protection to non-citizens has developed over the recent past. This view is expressed notably by the UN Human Rights Committee and the Advisory Committee on the Framework Convention. The latter defends an article-by-article approach to the question of definition*"[16].

34. In the same sense, the Parliamentary Assembly's Committee of Legal Affairs and Human Rights stated in its Report on Rights of National Minorities that "*It would be rather unfortunate if the European standards of minority protection appear to be more restrictive in nature than the universal standards, the more so that, as Article 27 of ICCPR is binding for all state parties to the Framework Convention*"[17]. It could also be questioned whether is it appropriate to deny the protection of traditional minority rights such as education, language and cultural rights to individuals whose status is still unresolved.

35. This holds true even though all individuals enjoy the general human rights protection, in particular the prohibition of discrimination, while specific categories such as refugees and displaced persons are the object of specific protection under international law. Regarding

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[15] Regarding persons holding the citizenship of the State Union and of the Republic of Serbia, this exception applies to them only in a very limited extent, i.e. as far as the electoral rights are concerned (such as right to elect representatives in Parliament and municipality assemblies [Article 27] and right to elect members of the Councils of National Minorities [Article 37]). See Article VIII of the Constitutional Charter.

[16] CDL-AD (2004) 013 Opinion on "Two Draft Laws amending the Law on National Minorities in Ukraine", para. 18.

[17] Doc. 9862, of 19 July 2003, para. 94.

these categories of persons, Article 3 of the draft Law could include the references to the applicable international instruments.

36. Considering the particular political and social context within the State Union in general, and in the Republic of Montenegro in particular, after the dissolution of former Yugoslavia and the Kosovo conflict, the Commission recommends that a larger scope of application be given to the present draft law. The solution proposed by Mr. Asbjørn Eide during the expert meeting of 16 March in Podgorica (see para. 3 above) - definition of national minority making no reference to citizenship, and approach on an article-by-article basis, could be followed. This means that the citizenship of the Republic of Montenegro will be specifically mentioned as a requirement for the exercise of the political rights.

37. The Commission welcomes the fact that the new draft law does not include any reference to the existence of possible kin-States, thus enlarging its personal scope of application, as suggested during the expert meeting of 16 March 2004.

### C. Prohibition of the abuse of rights

38. A better place for the prohibition of the abuse of rights provided for in Article 4 of the draft could be at the beginning of Chapter III of the Law ("Protection of rights"). The Commission suggests that para. 2 become the first paragraph, and para. 1 become the second one.

### D. Declaring one's own nationality

39. The Commission welcomes the new text of the article, drafted upon the example of the Framework Convention, as suggested during the expert meeting of 16 March 2004.

### E. International agreements with other states

40. New Article 9 of the draft Law sets forth the possibility for the Republic of Montenegro to conclude bilateral agreements on protection of national minorities with other States. This provision is in line with the Constitutional Charter, "*in so far as it is not in opposing the competences of Serbia and Montenegro, and interests of the other member State*". Such possibility is to be welcomed as it is in conformity 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[18], which highlight the bilateral (consensual) way in protecting kin-minorities.

### F. Use of minority languages and education in native language

41. The right to freely use a minority language in official communications is one of the most important rights for the preservation of the minority identity. The draft law goes beyond European standards in this field. The provision of Article 14 § 2, which provides that in municipalities where the population belonging to a national minority accounts for 5% of total inhabitants, the language of that minority shall be in official use, is to be commended. It should be noted though that the possibility to recognise, as official language, one or more minority languages is not provided by the Charter. As to the Constitution of Montenegro, its

[18] See CDL-INF(2001)19, Report on "the preferential treatment of National Minorities by their Kin-State".

Article 9 provides for the recognition of the status of official language only to languages of national and ethnic groups, which in a given municipality of the Republic account for "a majority or a substantial part of population".

42. One may also question whether the term "official use of language" has the exact meaning as the term "official language". Article 14 § 3 gives a definition of the former which does not explicitly imply the status of an official language. The question may thus arise which version will have a precedence when there is a difference between different versions of a document written in two or more official languages.

43. 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 words "depending on the financial means the Republic can afford" should be deleted.

### G. Representation of minorities in public life and participation in decision-making

44. Participation of persons belonging to national minorities in all aspects of public life is an important condition for their integration into the society of which they are part. Furthermore, the possibility to actively participate in the decision-making processes which govern the protection of minority rights appears necessary to ensure the effective enjoyment of guaranteed rights as well as the prevention of discrimination of minorities.

45. Specific procedures, institutions and arrangements are often established, through which minorities can influence decisions that concern them. Participation may include the ability of minorities to bring relevant facts to decision-makers, defend their views and positions before them, veto legislative or administrative proposals, and establish and manage their own institutions in specified areas.

46. The right to participation of minorities in decision-making processes is acknowledged in the Federal Law, the Constitutional Charter and the Constitution of Montenegro, albeit in different terms and scope[19]. The draft law provides for several forms of direct representation of minorities in public life of Montenegro, such as proportional representation in Parliament and municipality assemblies (Article 27), appropriate representation in public authorities, public institutions and local authorities (Article 29), and participation in the government decision-making processes (Article 30). It also recognizes the right of minorities to indirect representation, through Councils of National Minority (see *infra*, Paras. 58 - 61).

#### a. Representation in legislative bodies at all levels

47. Article 27 provides for additional number of seats in Parliament and municipal assembly, determined "*in proportion with the share of the concerned national minority in the total*

[19] The FRY Law only provides for an indirect representation of minorities, through establishing the National Councils of National Minorities (Article 19), the Constitutional Charter provides for the right to automatic representation in the State Union Assembly and adequate representation in public services, state authorities and local self-government (Article 52), while the Constitution of Montenegro establishes the right to proportional representation in public services, state authorities and local self-government (Article 73). See *infra*, para. 49.

*population number taken from the latest census in the republic and from the ballot results for special minority candidate list*".

48. It results from the text that the national minorities have automatic representation, in accordance with their percentage in the total number of population, as resulting from the census and 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"[20].

49. The said norm is in conformity with the Charter which provides for the right of automatic representation in the Assembly of the State Union (Article 52). On the other hand, there is some ambiguity regarding the conformity of Article 27 of the draft law with the Montenegrin Constitution, which establishes the right to "*proportional representation in public services, state authorities and in local self-government*"[21]. It is unclear whether this provision is indeed intended to ensure proportional *representation* of minorities in the said bodies. Having in mind Article 29 of the draft Law (see *infra*, Para 56), and Article 21 of the Federal Law, it seems that it should mean that such representation must be guaranteed in respect of the policy of recruitment of public officials and judges.

50. With respect to the implementation of the guaranteed representation rights, the manner the census is conducted becomes particularly important. The draft law should set forth a special provision guaranteeing the impartiality of its procedure, as well as its accuracy.

51. As to the manner of election of representatives of minorities, the draft law provides for a system of separate representation[22]. According to Article 27 § 3, persons belonging to national minorities have the right to choose whether to vote for a general national (or municipal) list like the majority citizens, or for specific minority lists. This is a particularly sensitive issue as the organisation of elections, the choice of the method of voting and the procedure for allocating seats are assimilation techniques *par excellence*. In this respect, the Commission recalls the Code of Good Practice in Electoral Matters[23].

52. The Commission also wishes to stress that any special voting system for minorities requires that the voters and the candidates concerned reveal their belonging to a minority. There are many possibilities to secure the confidentiality of the information provided. The Commission would therefore strongly favour clarifying which precautions will be taken to effectively protect it.

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[20] There is only a limited number of member States of the Council of Europe that guarantee (automatic) representation of national minorities to the Parliament (for instance, Austria, Croatia, Cyprus, Romania and Slovenia).

[21] One should note that Article 29 of the draft Law, Article 21 of the FRY Law as well as Article 52 of the Charter speak of "adequate" representation.

[22] The number of States providing for a separate representation of minorities is relatively small (for example, Croatia, Romania and Slovenia). Some other states have adapted their electoral systems to minority representation through abolishing a threshold for minority political parties (for example, Poland and Germany). In certain states, there is no threshold at all (such as Belgium, Bosnia and Herzegovina, Spain and Switzerland).

[23] Science and technique of democracy, no. 34, 2002.

b. Minority legislative veto

53. In order to ensure that the interests of persons belonging to national minorities are effectively safeguarded in area that concern them, the constitutions of a number of countries require a special majority in the legislature for the adoption of legislation related to certain domains of particular significance for minorities[24], or provide for a special procedure that enables the minority concerned to suspend the adoption of a law under certain conditions[25].

54. Article 34 of the draft Law establishes a special procedure for the adoption of a proposed decision on the agenda of a parliamentary or municipal assembly's session, when such decision concerns one of the issues of particular significance for national minorities which are listed in the draft law[26].

55. It is to be noted that such procedure generally represents a matter that is to be regulated by the Constitution or the internal parliamentary regulations. Neither the Constitutional Charter, nor the Constitution of Montenegro provide for such a possibility. An ordinary law should therefore not be allowed to regulate on this matters. At any rate, if this procedure is to be kept in the final draft, it could be specified that "the deliberation about the proposal cannot be put *again* on the agenda".

c. Participation of minorities in public authorities

56. The procedure ensuring representation of national minorities in "*public authorities, public institutions and local authorities*" (Article 29) does not seem to be adequate. It results from the current drafting of the article that the political level "looks after" the representation of the minorities in these institutions. The involvement of the political level in appointing such representatives is to be avoided especially when it comes to the representation within the judiciary. The Commission is of the opinion that an appropriate solution would be to set forth that persons belonging to national minorities shall be able to work in public institutions in conditions of equality with the others, and according to their own individual merits.

## H. Promoting cultural and linguistic identity

57. As far as Article 36 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.

[24] As for example in Belgium and Hungary.

[25] This kind of mechanisms is used for example, in Bosnia and Herzegovina, Slovenia and since 1997 Peace Agreement, in Northern Ireland.

[26] "*Issues related to altering ethnic composition of population contrary to the will of local population; issues related to adopting curricula and teaching programs without the approval of the Council of national minorities; and issues related to preservation of linguistic and cultural identity of national minorities*".

### I. Councils of National Minority

58. Independent advisory bodies comprising representatives of minorities and advising the state authorities in the field of minority policies may have an important role in ensuring better protection of their interests.

59. The Commission welcomes the readiness of the Montenegrin authorities to establish the Councils of national minority in the country.

60. Provisions concerning the elections, the organisation and the functioning of the Council(s) are to be adopted by the Council(s) themself(ves) (Article 37, Paras. 5 and 8). Regarding the method of election of the members of the Council, the Commission is of the opinion that this matter should remain within the powers of Parliament, the only body able to guarantee the equality of treatment and the fairness of the procedure. This is particularly important having in mind that the election procedure will require prior registration of the persons belonging to national minorities (in this respect, see *supra*, Para. 52).

61. Taking into account the importance of the competences of the Council, as provided in article 39, the real *degree of representation* of the Council is of utmost importance.

### J. Protection of the rights guaranteed by the draft law

62. The draft law provides for two systems of protection of the guaranteed rights : protection by the judicial authorities, and the protection by the executive (Article 43). The latter, political dimension of the protection is particularly important in the light of the framework character of many of the provisions of the draft law, which cannot be directly implemented by the judicial authorities but require the adoption of secondary legislation.

63. Article 43 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.

64. Regarding judicial protection of the minority rights, the right of individual complaint for a concrete as well as an abstract constitutional review is to be commended. However, the present drafting of the Article raises several concerns.

65. According to Article 45 § 2, anyone can introduce a constitutional complaint "if no other judiciary protection is provided". It is unclear whether this means that the Constitutional Court can be seized only after all legal remedies provided for by law have been exhausted or when there is *no* possible judicial protection concerning a given matter. The latter meaning would imply that some rights guaranteed by the Constitution or the draft law are deprived of ordinary judicial protection in the legal order of a State which is a contracting party to both the ECHR and the Framework Convention. On the other hand, it could also imply that a constitutional complaint is a purely theoretical remedy, as in practice it will always be possible to seek ordinary judicial protection. The final draft of the law should therefore clarify this important issue. The Montenegrin authorities could also consider - in the context of the constitutional revision process presently taking place in the country – specifying that a constitutional complaint may be introduced on the condition that all other legal remedies

have been exhausted, as it is the case in other European countries that allow for individual complaints[27].

66. It may also be questioned whether the rights having a strong collective dimension can be the object of a constitutional complaint, such as the right to use national symbols, to the celebration of minority historical dates and events, to a parliamentary and municipal representation, or the right to participation in public decision-making processes. The complaints, which have to be submitted to the Constitutional Court, should be clearly distinguished from those that are within the competence of the ordinary tribunals.

67. The Commission notes that the Councils of national minority no longer appear among the subjects authorised to lodge a constitutional complaint. They may only lodge a petition to the President of the Republic requesting that the law in question not be promulgated. Such right of the Councils is coherent with their advisory role.

68. The programmatic character of many provisions of the draft law might lead to a situation where numerous actions for unconstitutionality of statutes, general acts and individual acts of government authorities are brought before the Constitutional Court. In such cases, the issue of the legal status of the draft law within the hierarchy of legal sources in Montenegro becomes of the utmost importance (see *supra*, Para. 21).

## IV. CONCLUSION

69. The new draft Law is a fairly good piece of legislation, and its provisions could thus contribute towards building a comprehensive framework for the protection of national minorities in Montenegro. It is generally in line with international standards, and in certain respects even goes beyond them.

70. The Commission notes, however, that not all the questions raised in its previous comments and during the expert meeting of 16 March 2004 have been fully answered, such as the issue of terminology, the inclusion in the definition of "minority" of the citizenship criterion, the method of election of the Councils of national minority and the effective judicial protection of the guaranteed rights.

71. In future, the main challenge will be to fully implement the law. This includes establishing Councils of national minorities as representing the interests of the minority community, large-scale minority participation in the elections, and rules in place ensuring such participation. It also includes building a social context allowing for an effective realisation of the guaranteed rights.

72. The Commission remains at the disposal of the Montenegrin authorities for any further co-operation in this field.

[27] The *Verfassungsbeschwerde* in Germany and *recurso de amparo* in Spain are the best known examples of constitutional complaint.