

Chapter 10

THE LEGAL ASPECTS OF THE PROTECTION OF MINORITIES IN THE PROCESS OF STABILISATION AND ASSOCIATION

Snježana Vasiljević
Faculty of Law
Zagreb

ABSTRACT

Among the main conditions for joining the European Union (EU) is the protection of human rights, particularly the protection of minority rights. This paper will consider the protection of minority rights in Croatia since independence in 1991. In four chapters the paper analyses some of the essential segments of the protection of minorities in the international context as well as the obligations of Croatia in this context. The analysis centres on the Constitutional Law on the Rights of National Minorities adopted in December 2002. The position of minorities before and after this law came into force is compared.

Key words:

human rights, ethnic minorities, ethnic origin, discrimination, equal opportunities, Constitutional Law on the Rights of National Minorities, international community, European Union

INTRODUCTION

This article discusses the position and rights of the national minorities in Croatia. In the light of the introductory remarks, it is nec-

essary to limit the objective of the paper. Four chapters will give a review and analysis from the legal aspect of the statutory approaches to minority affairs in Croatia since 1991. As well as a review of the protection of minorities in international law, the undertakings Croatia has given to the EU in the handling of minority matters and an analysis of current and previous statutory approaches, the article will also put forward a number of measures and recommendations for improvement of the legal position of minorities in Croatia. What is an ethnic (or national) minority, how it is defined and understood, has been the subject of many discussions in recent literature in the EU (Closa, 1995; Recital, 1997; Beenen, 2001; Bell, 2002). This dilemma requires a special place and a detailed analysis that this work cannot deal with. Since the Croatian constitution discusses ethnic equality and the prohibition of discrimination based on ethnic origin, minorities in this text are taken to mean ethnic minorities. In Croatia the term national minority is commonly used, but the English version of this text will adhere to EU and international usage in referring to ethnic minorities.

Croatia has undertaken to protect human rights by the very fact that it is a member of the UN, the most important institution in the pyramid of human rights protection. The high standards of protection of human rights and the standards of treaties and the legislation of the EU impose the obligation to respect the rights of individuals, and within the framework of this, the rights of members of minority groups.¹ Through the prism of minority rights in Croatia, in four chapters, the problem of minorities as a whole will be discussed, over the time since the proclamation of independence. The Constitutional Law on the Rights of National Minorities will be at the centre of the comparison of the state before and after it came into force. The new Constitutional Law was appended to the application for membership in the EU, in February 2003, and hence this Law is a foundation for an analysis of the before-and-after condition.

THE INTERNATIONAL PERSPECTIVE

Protection of minorities in international law

International protection of minorities started as far back as the 17th century with sporadic introduction of provisions about the protection of religious and ethnic minorities in treaties settling some of the

basic European political and territorial matters. The Treaty of Westphalia (1648) is commonly held to be the first important treaty dealing with mutual tolerance of religious communities in Germany (Vukas, 2003). In terms of substance and space only the Treaty of Berlin, concluded in 1878, was more important. Turkey and the Balkan states that had been liberated from its five centuries of aggression and occupation had to enter into international undertakings concerning religious liberty and the equality of citizens.ⁱⁱ The systematic protection of minorities, however, was established only at the time of the League of Nations.

Unlike the protection of human rights, the protection of minority rights is not mentioned in the UN Charter of 1945. In the composition of the Charter and the Universal Declaration of Human Rights (1948), there was a prevailing interest in the protection of the individual, and not of particularly threatened groups, as at the time of the League of Nations (refugees, stateless persons, minorities). Still, in 1947 a Sub-Commission for the prevention of discrimination and the protection of minorities was set up. In this Sub-Commission an attempt was made to define minorities, but no official definition has yet been adopted.ⁱⁱⁱ In the UN the emphasis is upon the international protection of every individual, and thus in Article 27 of the International Covenant of Civil and Political Rights it is written that: "In states where there are ethnic, religious or language minorities, persons who belong to such minorities must not be deprived of the right, together with the other members of their group, to have their own cultural life, to confess their own religion or to use their own language" (Hrženjak, 1992). The protection of minorities in international law culminated in 1992 with the adoption of the Declaration on the Rights of Persons Belonging to National and Ethnic, Religious and Language Minorities. The adoption of this Declaration attempted to address the matter that had been raised since the International Covenant had come into force (1978), like whether for the enjoyment of the rights defined in Article 17 of the Covenant it was necessary to acknowledge the existence of a given minority in its region; whether these rights belonged only to members of minorities, to individuals, or to minorities as communities; and whether the member states of the Covenant, pursuant to Article 27, were bound only to tolerate the independent activities of minorities connected with the enjoyment of those rights, or whether the states were bound actively to help the minorities to put these rights into effect. In the declaration, member states of the UNO undertook to take the

lawful interests of members of minorities into account in framing their national policies and programmes, as well as in international programmes of collaboration and assistance. They also undertook to collaborate in furthering the rights of members of minorities set out in the Declaration. Members of minorities could exercise all their rights individually, but also with other members of their group, without any kind of discrimination.

Since the protection of minority rights in the frame of international law was started in Europe, and at the time of the League of Nations a relatively effective system for the protection of minorities was created, a very great deal was expected from European regional organisations in connection with the development of international standards about minority protection in European states. Although above all the Council of Europe was looked to, the European Convention on the Protection of Human Rights and Fundamental Freedoms (1950) has no special provisions about minority protection. The only provision in which minorities are mentioned is Article 14, where, as one of the impermissible grounds on which people can be discriminated against in the enjoyment of their rights and liberties stated in the Convention, "affiliation to an ethnic minority" is mentioned. It is important to state that the previously mentioned documents are treaties that Croatia is a party to. The Constitution of Croatia in Article 140 states that treaties that have been ratified and published are enforced directly and have a force above statute (NN 41/01).

By founding the Venice Commission in 1990, the Council of Europe attempted to work out a document to guarantee the protection of minorities. Still, the Council never finally worked out a document conceived in this way. The CSCE, which developed in 1994 to the OSCE, carried out this job. As early as in the Helsinki Final Act, on August 1, 1975, within the framework of principles about human rights, specific guarantee is given of the rights and legal interests of persons who belong to ethnic minorities. Finally, in the Final Document of the CSCE meeting concerning the human dimension held in Copenhagen in 1990, a comprehensive chapter on minority rights was adopted (for more details see Vukas (2003)). CSCE documents use the phrase *national minorities* as a generic name for all the minorities whose rights these documents refer to, that is, to minorities that are marked by special ethnic, cultural, linguistic or religious characteristics.

By 1994, an instrument for the protection of minority rights within the Central European Initiative (CEI) had been composed; this contains one of the most exhaustive lists of minority rights to be found

in international documents. In this document the states of this group took over the essential already-existent rules of universal and European international law concerning the rights of minorities, and additional rules were put in corresponding to the particular features of Central Europe. Although this is not a treaty, it is important in that in it there is a definition of national minorities, which so far had not been found in documents adopted at the international level, only within the international legislation of some of the states. A “national minority” is defined as a “group that is numerically smaller than the rest of the population of some state, the members of which, as citizens of this state, have ethnic, religious or linguistic characteristics that are different from the rest of the population and who wish to preserve their culture, tradition, religion and language.” (Vukas, 2003:305). Within the CE, after many initiatives, a treaty concerning the protection of minority rights has at last been adopted, with the adoption of the Framework Convention on the Protection of Minority Rights, February 1, 1995.^{iv} The main criticism of this document is that the scope of minority rights, according to the wording of the Convention, is fairly narrow. However, it did help Croatia, as state member of the Council of Europe, to create its Constitutional Law on the Rights of National Minorities.

European Union and candidates

Discrimination of minority groups has become one of the main problems that members of the EU and the candidates have to face. Matters of racial, ethnic and sexual discrimination have become one of the chief headaches of the heads of the Union, and hence it was decided to devote special care to the suppression of these forms of discrimination and protection of the rights of the victims. What is more, the matter and the degree of the protection of these rights became one of the main preconditions for states that aimed at becoming members of the Union in the future (Recital, 1997). The present text and the form of the anti-discriminatory legislation in the EU, through experience to date, show that alongside the legislative framework there also has to be an effective strategy for the suppression of racial and ethnic discrimination (Directorate-General for Research, 2003). Hence the EP has consistently highlighted the need for a multidisciplinary approach to the solution of these forms of discrimination. Alongside multidisciplinary action, there is also the need for a better harmonisation among the various areas of EU politics to do with the promotion of equal minority

opportunities. The EU promotes this kind of policy not only inside but also beyond its frontiers. For this reason, current and future candidates for membership must meet the demands for protection against all forms of discrimination, particularly racial, ethnic, religious and gender. Only by meeting these criteria will states be allowed to submit their candidature. Thus, the Croatian Constitutional Law is actually appended to the Croatian candidature for membership. Today's candidate states, such as the Czech Republic and Romania, also have to face the problem of racial and ethnic intolerance. The most at-risk minority group in these states is that of the Romany (ELDR, 1997:13).

In order to obviate racial and ethnic discrimination, at the level of member states of the EU, one idea was to establish the criterion of ratification of the UN Convention for the Abolition of Racial Discrimination (1969) as a condition for membership of the EU. This condition was rejected as being unrealistic since not all the actual member states are at the moment members of this Convention.^v The second EU ambition was to encourage potential member states to create their own anti-discrimination legislation. This was also an unrealistic expectation. But, with the objective of getting things away from the stalemate position, primary EU legislation took on more substance when the Amsterdam Treaty came into force, with the inclusion of anti-discrimination provisions into Article 13 of the Treaty.^{vi} According to this Article 13, a primary source of law for the European Community, the Union undertakes to take all measures necessary to prevent discrimination on the grounds of sex, race or ethnic origin, religious or other beliefs, disability, age or sexual orientation. In addition, the Treaty of Amsterdam introduces the concept of European citizenship, which does not replace nationality or citizenship of a member state but is rather an attempt to create a European nation (Closa, 1995). The range of rights of European citizens guaranteed by the treaty is limited, and it is a matter of only political rights. However, what is interesting is that the introduction of the concept set off a great many discussions on the definition and understanding of concepts such as nationality and citizenship (Beenen, 2001). With the development of the concept of citizenship one might change the understanding and definition of the concept of minority, particularly after the accession of the countries of CEE to the EU. For the purposes of this paper, it is necessary to explain that the overall law of the European Community, whether contained in the Founding Treaty, in some instrument of an institution of the Community or in any other source, has a superior status vis-à-vis the whole of national law, including constitutional provisions (Ćapeta, 2002). The superiority of

Community law is a condition to forestall the abolition or modification of the law of the Community against the will of all the member states, who are alone all together authorised to do this. Apart from that, the role of legislative bodies of the member states is, on accession to the EU, essentially reduced, because of the transfer of regulatory authority to the European bodies, the role of the national courts is increased because it is precisely on them that the real application of European law depends. The national parliaments may not regulate matters that have been placed within the purview of the Union, and yet the courts are obliged not only to apply European laws but also by the method of excluding things that are unlawful, to prevent the application of national laws, even of a constitutional nature, if they are against European legal standards (Rodin, 1997). The Racial Equality Directive of 2000^{vii} is a secondary source of Community law, in which the Union has undertaken, via measures of “deliberate policy,” to promote equal opportunities for ethnic minorities, and also to suppress racial discrimination. The purpose of the directive is to establish a framework for the prevention of discrimination according to racial or ethnic origin, making the principle of equal treatment law in all the member states. In addition, the directive defines for the first time direct and indirect discrimination, the definitions of which were later incorporated into the Equal Treatment Directive.^{viii} Harassment on the basis of racial or ethnic origin is also discrimination, that is, every undesirable form of behaviour directed against persons of different racial and ethnic affiliation the aim or effect of which is a violation of personal dignity, especially by the creation of a frightening, inimical, degrading, humiliating or threatening environment. Every incitement to discrimination is also considered discrimination in the sense of the Directive. The scope of application of the Directive will be expanded to cover private and public sectors, as well as area of employment, self-employment and further education, including the criteria employed during hiring, further education and promotion. Here one can notice a shortcoming in the Directive, because its scope is at once broad and indefinite and also limited because of its emphasis on its application to a very narrow area. The Directive should be applied in other areas, such as social services, health and education. The most important new departures brought in by the Directive is the legislation of special measures the application of which is allowed in certain cases in which members of racial or ethnic groups are under-represented as compared with members of the majority groups. Still, special measures are not specially worked out by the Directive; rather it is left to member states to work out the contents of

the separate individual measures in their national legislation. Member states are at the same time obliged to promote the social dialogue and a dialogue with NGOs. The deadline for the application of the Directive was July 19, 2003. Alas, not all member states managed to apply the Directive in this period. As many as eleven member states have not yet put the Directive into effect in their national legislation.^{ix} So far, only France has informed the European Commission of “partial” adoption of the Directive. They were followed by Denmark. Belgium, Italy, Sweden and the UK adopted the provisions in their national legislations. Unfortunately, the same cannot be said of Austria, Finland, Germany, Greece, Luxembourg and Spain, which have not even started the procedure for adopting the Directive. As for the progress of the candidate countries, in Romania an anti-discrimination law has been passed, and a special body for control and complaints has been set up. The application is at the moment only at the level of the letter of the law. Hungary is currently putting in enormous efforts to do the same by the end of 2003. The quality of the newly created laws will be visible when they are put into effect in practice. It remains to be seen what the consequences of non-implementation will be. One possible effect is states’ liability for damages because of the non-application of the Directive in the time given. The most important reason for the existence of state’s liabilities for damages is the demand to achieve as high as possible a degree of effectiveness of Community law. Countries have to undertake all necessary measures to ensure the fulfilment of their obligations founded on Community law. One of such measures is the “obligation to annul the illegal consequences of infringements of Community law” (Ćapeta, 2002).

EU legislation still does not have any effective legal protection for human rights. The only legally binding document for the protection of human rights in Europe is the European Convention for the Protection of Fundamental Human Rights and Freedoms (the Convention, for short). According to Article 14 of the Convention, a general clause, the exercise of the rights and liberties acknowledged in the Convention, must be ensured without discrimination on any basis whatsoever – either on the grounds of sex, race, colour, language, faith, political or other opinion, ethnic or social origin, affiliation to an ethnic minority, wealth, family or any other basis. This article cannot be applied without invoking the infringement of some other right.^x Although the EU is not a party to the Convention, since it is not a legal entity, the European Court in Luxembourg has started to apply its rules. This means that parties to the convention (members of the Council of

Europe) must ensure that its rules are really applied. At the moment a debate is being waged in the Union about the future appearance of an enlarged Europe. The Convention on the Future of Europe, the work of which should result in a new European Constitution, will bring about some important changes in the mechanisms for the protection of human rights in the Union. The EU should thus acquire legal personality and thus automatically become a party to the European Convention. The European Court for Human Rights in Strasbourg would thus expand its jurisdiction to one more legal entity, the EU itself.

Croatia: national minorities and undertakings for membership in the European Union

The obligation to pass a new Constitutional Law on the Rights of National Minorities derived from 1996, from the acceptance of Croatia into the Council of Europe. Croatia acknowledges the members of the peoples of all the former Yugoslavian republics who are Croatian citizens the status of member of minorities. However, in line with international law, minorities have to exercise their minority rights, irrespective of the recognition of their minority status by the state in which they live.

As far as the Council of Europe is concerned, on March 15, 1996 Croatia agreed to apply the recommendations of the Venice Commission on a Constitutional Law on National Minorities in order to meet the conditions for entry into the said organisation. In May 1997 the Government agreed with the Venice Commission on the founding of a Council of National Minorities the objective of which was to create a forum in which the representatives of the minorities could meet regularly with representatives of the Government to talk about matters that touch on minority protection policy.^{xi} The Council was founded in January 1998. In 1997, the Venice Commission^{xii} had recommended that every revision of the Constitutional Law should contain the relevant provisions of the Letter of Intent (HRT, 2003). In April 1999, the Parliament of the Council of Europe passed a resolution calling upon the Government to “adopt a constitutional law to revise the suspended provisions of the constitutional law of 1991 in line with the recommendations of the Venice Commission and taking into account the new reality” by the end of October 1999 at the latest.^{xiii} Only in 2000 did the Government supply to the Venice Commission a draft law that was worked out by a committee of experts and representatives. The

Commission considered this draft positive, in the sense that it was an advance in the protection of the rights of ethnic minorities in Croatia. In February 2000, the new Government presented its legislative programme, undertaking to support minority rights and to make legislative and administrative changes enabling the return of Serbian refugees. In April of the same year, the new Parliament passed laws concerning minorities' languages and education; in June, amendments to the Reconstruction Law and the Areas of Special National Concern Law.

Obligations to protect human rights, particularly minority rights, were also assumed by Croatia when it signed the SAA with the EU and its member states on October 29, 2001. This contract gave Croatia special status as a *potential candidate*. The SAA has still not come into force, but since January 28, 2002, an Interim Agreement has been in force giving effect to the economic provisions of the Agreement (more on this see Rodin (2003)). The obligation of Croatia also derives from the resolution of the Council of Ministers of the Council of Europe of February 2002 concerning the implementation of the Outline Convention,^{xiv} the Report of the European Commission concerning Stabilisation and Association, and the Mission Status Report of June 2002.^{xv} In the report of the European Commission on Croatia's progress it was possible to see the importance of meeting the political criteria, on the fulfilment of which the evaluation of the implementation of the entire process depended. The three main political conditions relate to the strengthening of democracy and the rule of law, the respect for human rights and protection of minorities, and regional collaboration (Rodin, 2003). By adopting the new Constitutional Law, Croatia made an advance in meeting one of the conditions for membership, the criterion of the protection of human rights. Thus the legal position of minorities in Croatia today is founded on the provisions of the Constitution, which guarantees the equality of all members of all national minorities^{xvi} and on the Constitutional Law on the Rights of National Minorities.

THE STATE OF AFFAIRS IN CROATIA BEFORE THE NEW CONSTITUTIONAL LAW WAS PASSED

In December 1991 the Croatian Parliament passed the Constitutional Law on Human Rights and Freedoms and the rights of

National and Ethnic Communities or Minorities in the Republic of Croatia (NN 65/91). Passing this law was a precondition for the international recognition of Croatia as independent state in January 1992. At that time, Croatia, like the other states that were created in the area of the former Yugoslavia had been left a relatively high degree of protection of collective rights of minorities (right to education in own script and language at all levels of education, right to the official use of the language, various opportunities for the preservation of ethnic, language and religious identity and the institution of the political representation of minority interests). Croatia took over and recognised all these inherited rights. It signed two bilateral treaties relating to the protection of minority rights: an agreement between Croatia and Hungary concerning the protection of the Hungarian minority in Croatia and the Croatian minority in Hungary of 1995, and the agreement between Croatia and Italy concerning minority rights. The problem, however, came into being with the new minorities, that is with the members of the peoples that had been constituent nations in the former Yugoslavia, particularly with the Serbs of Croatia, who in the socialist Croatia had the status of sovereign people (Daskalović, 2003). Nevertheless, in 1992 Croatia had to amend the existing Constitutional Law; the main reason was that the text of the Law as it then stood did not include to an adequate extent the right of the minorities to political autonomy in areas where they are a majority (more in Matulić, 2003).

In Title III of the Constitutional Law it was said that the right of the minorities to cultural autonomy and other collective rights, including freedom from discrimination, the right to survive, the right to an identity, the right to a culture, the right to religion, the public and private use of a script, the right to education, the right to take an equal part in public affairs, such as for example the exercise of political and economic liberties in the social sphere, the access to media and in the field of education and generally of cultural affairs, the right to decide to which ethnic community or minority the individual citizen wished to belong. Title IV determined the right to proportional participation in representative and other bodies. A minority that was more than 8% of the entire population had the right to be represented in parliament in proportion to its share in the total population. A minority that was less than 8% had the right to 5 representatives in Parliament. The Constitutional Law provided for a special law regulating the representation of minorities in other bodies of national government. It also determined the right to political autonomy. The right to political autonomy belonged to minorities in districts (special status districts) in which they

made up an absolute majority according to the census of 1981. Apart from this, the Constitutional Law also provided for two kinds of control of its own implementation: international control and collaboration on the implementation of its provisions in the special districts. A special provision of the Constitutional Law enabled the districts to file a constitutional suit with the Constitutional Court if by some instrument of national government their liberties and rights guaranteed by this law were violated.

At the end of September 1995, after the combined police and army operations through which the government once again took control of the whole region previously controlled by the Serbs, except for Eastern Slavonia, which was placed under temporary UN administration, the Parliament “temporarily” halted the implementation of most of the laws, especially those that related to the Serbian minority. This caused many problems in Croatia and led to pressures from the international community.^{xvii} The general provisions, those provisions about representation that related to the smaller minority communities (Italians and Hungarians) remained in force.^{xviii} Although Croatia undertook according to the standards of international documents to protect all other ethnic minority rights, right up to the Constitutional Law of 2002, there was no proper law to guarantee this kind of level of protection, a level in line with European standards.

THE STATE OF AFFAIRS AFTER THE NEW CONSTITUTIONAL LAW WAS PASSED

The new Constitutional Law on the Rights of National Minorities

According to the new Constitutional Law, Croatia undertakes to respect and protect the rights of national minorities and other fundamental human and civil rights, the rule of law and all other highest values of its own constitutional and the international legal order, for all its citizens. This is not just about human rights and liberties guaranteed by the Constitution, but all the other rights provided for in the treaties that Croatia is party to. Thus, Croatia has bound itself to guarantee equal rights to all, irrespective of sex, race, skin colour, language, religion, political or other belief, ethnic or social origin, connections with an ethnic minority, property, status from birth or from any other basis. Rights so guaranteed are an indivisible part of the democratic system and

enjoy the necessary support and protection, including affirmative measures benefiting the ethnic minorities.

National minorities, according to the new Constitutional Law, are “a group of Croatian citizens the members of which have been traditionally living in the territory of the Republic of Croatia, and the members of which have ethnic, language, cultural and/or religious characteristics different from other citizens, and who are guided by the desire to preserve these characteristics” (Article 5). For the first time, then, in Croatian law, the concept of a national minority is defined.

With the objective of promoting development in Croatia, the respect for multicultural and linguistic diversity, and the rights and liberties of individuals, in the new Constitutional Law, there has been an endeavour to incorporate high standards of the protection of the rights of ethnic minorities as established in treaties. In addition, Article 4 Paragraph 4 of the Constitutional Law on the Rights of National Minorities forbids any form of discrimination based on minority status. Members of minorities are guaranteed equality before the law and equal protection under the law.

Although during the debate on the draft there was no markedly positive political climate for it to be passed, with the adoption of this law, a constitutional and legal framework was nevertheless created for the exercise of minority rights. The political background to the adoption of it is not discussed here, only primarily the legal framework. Within the legal framework, as the Constitutional Law itself states, the provisions of this Constitutional Law and the provisions of separate laws governing the rights and freedoms of members of national minorities have to be interpreted and put into effect with the purpose of respecting members of national minorities and Croatian citizens, the development of understanding, solidarity, tolerance and dialogue among them (Article 8). Since the Law was adopted and came into force in December 2002, it will be possible to make a true assessment of the state of affairs only after some fairly long period of time, since the provisions of the law do not necessarily entail the certainty of improvements in the social, economic, cultural and other conditions in which minority interests can be exercised, for they are dependent to a very great extent on the overall development of Croatia.

Political rights of minorities

The new Constitutional Law states that minorities will be represented by members of parliament elected in special constituencies.

According to the existing wording of the law, special measures are allowed, but in the context of political rights of minorities the right to a double franchise is not specifically stipulated. In addition, there is no proportional representation stipulated in local executive and national administrative and judicial bodies, nor is there any opportunity for minority representatives to be elected from the party lists. Instead of proportional representation, the Law enables "representation ... taking into account the proportion of the members of national minorities in the total population at the level at which the body of the government administration or judicial body is founded." The Serb minority, which has 1.5% of the total population, will have from one to three representatives. The ten numerically inferior minorities will have, as heretofore, four representatives all told. The Italians and Hungarians will continue to have one each, and the Czechs and Slovaks will have a representative in common. Members of Austrian, Bulgarian, German, Polish, Romany, Romanian, Ruthenian, Russian, Turkish, Ukrainian and Jewish minorities will together choose one representative in the Parliament. Members of the Albanian, Bosnian, Montenegrin, Macedonian and Slovene minorities will also jointly elect a single member of parliament. In the most recent amendments to the Law concerning Elections of Members of the Croatian Parliament, April 2003, in line with the Constitutional Law, another three seats were added for minority representatives (Article 16) (NN 69/03). Thus after the elections of November 2003, there are a total of eight members of parliament for the national minorities, of which three are reserved for Serbs. Croatia is one of the three European states that have guaranteed seats for minorities, along with Slovenia, which has two, and Romania, 15. The Constitutional Law governs the founding of a council of national minorities and representatives of minorities in units of self-government, also known as minority self-government.

The Constitution (Article 15 Paragraph 3: "As well as the universal franchise, the law can ensure members of national minorities the special right to elect their representatives to the Croatian Parliament") and the Constitutional Law (Article 3 Paragraph 1: "The rights and freedoms of persons who belong to national minorities, which are fundamental human rights and freedoms, are an inseparable part of the democratic system of the Republic of Croatia and enjoy the necessary support and protection, including affirmative measures for the benefit of national minorities") suggest the interpretation that the minorities have the right to vote twice. Nevertheless, this right was not used at the last elections to the Parliament. The provisions concerning the right to a double vote were not put into the last amendments to the Law on

Elections of Members to the Croatian Parliament; hence the question arises as to its harmonisation with the provisions of the Constitution, international and European law that, as has already been explained, have a legal force greater than that of statute.^{xix} The exercise of special rights is guaranteed in Article 7 of the Constitutional Law, when members of minorities exercise them individually or in concert with other persons who belong to the same minority.^{xx} The realisation of special rights, according to the Constitutional Law, is bound to be ensured by the Republic of Croatia.

The demand for special rights, although very often disputed, can be justified by reference to the theory of liberalism. It is necessary to point out that the demand for special rights must have justification in the context in which it is applied. Thus Kymlicka (1989) for example asks “if the demand for special minority rights is founded on different choices/elections or on unequal circumstances?” This is an important question, because special rights for a minority involve special costs for others, limiting their rights. If the cultural rights of a minority are justified on the basis of the promotion of its selected values, then it would be unjust and incommensurable with the principle of the neutrality of the state, which does not allow the use of political power for the purpose of the isolation of the choice of the minority from the working of the market. It is completely legitimate to demand from the minority community that it shapes its life plan taking into account the costs that others have to pay, which are defined by the market. However, Kymlicka thinks that minority rights can and should be justified not on the basis of common choice, but on the basis of unequal circumstances. In contrast to the dominant culture of the majority community, the very existence of the cultural community of a minority depends on the decisions of the majority. It can be voted down by the provision of all the resources necessary for its existence, and this is a possibility which members of the majority culture do not have to face. As a result of this, members of a minority culture have to spend their own resources in order to ensure their affiliation to their own cultural community, which constitutes the point of their living, while the majority people gets this for free. In this way Kymlicka (1989) shows that the special measures that the minority demands serve to correct the advantage that the majority has even before anyone exercises his or her choice. This is a kind of inequality that has no connection at all with the choices of the minority group. According to Kymlicka (1989), the correction of this inequality is the basis for the liberal justification of minority rights as collective rights.

The Constitutional Law in Article 23 (NN 154/02) goes on to prescribe the rights of minorities to elect their representatives for the sake of taking part in public life and managing local affairs via councils and representatives of minorities in the self-governing units. Members of a national minority in the units of self-government in the area of which members of a given minority make up at least 1.5% of the total population, in units of local self-government in the area of which there live more than 200 members of a minority and in units of regional self-government in the area of which more than 500 members of a minority live can elect a council of minorities. According to the Law, ten members are elected for a municipal minority council, for that of a city 15 members, and for the council of a county 25 members of a national minority. Although from the actual wording of the law it is not clear whether this is a maximum number or a fixed number of members, the assumption is that it is a fixed number. Members of councils of minorities and representatives of minorities are chosen directly by secret ballot for a period of four years.

The Law also provides for the foundation of a national level Council for Minorities, a body that would deal with the proposal and solution of matters related to the protection of the rights and liberties of the minorities. This Council would be founded primarily to let the minorities play a part in public life, particularly for the sake of considering and proposing the government and settling of matters related to the exercise and protection of the rights and freedoms of minorities. The Council is bound to work with the competent bodies of the national government and bodies of self-government, with the councils of the minorities, or with minority representatives, associations of minorities and legal persons that carry out activities enabling the attainment of minority rights and liberties (Article 35 Paragraph 1). The Council has a very wide purview, while the Government appoints members for a period of four years. According to the current provisions, the actual substance of the collaboration enjoined is not clear. It is crucial to work this out in detail. Also unclear is the sphere of competence of the Council, since it is never stated in detail what the expression “the Council has a wide sphere of competence” entails. In addition, it is clear from whose ranks and according to which criteria the members are to be appointed. The Council primarily has the right:

- to suggest to government authorities that they discuss given matters that are important for the minorities, particularly the implementation

of the Constitutional Law and special laws governing minority rights and freedoms;

- propose to bodies of national government measures for improvement of the position of a minority in the state or in some area of it;
- give opinions and make proposals about programmes of public radio and television meant for the minorities, the treatment of minority matters in programmes of public radio and television and other media;
- propose the undertaking of economic, social and other measures in areas traditionally or considerably inhabited by members of minorities so as to make sure of their survival in these areas;
- seek and obtain from bodies of national government and bodies of local and regional self-government data and reports necessary for the consideration of any matter from its purview;
- to summon and demand the presence of representatives of bodies of national government and local and regional self government in whose jurisdiction are matters from the purview of the Council as laid down by the Constitutional Law and the Council's charter.

From all this it seems that the Council has a consultative or advisory role only in the implementation of the provisions of the Constitutional Law. The function of control of the implementation of the Constitutional Law and the ability to exercise the rights and liberties of minorities is assigned to bodies of the civil service in matters from their own jurisdiction. The Government is bound at least once a year to submit to the Parliament a report about the implementation of the Constitutional Law. The guaranteed independence in the work and activities of the Council and the smaller councils is certainly positive. The councils for national minorities, or the representatives of national minorities and the Council for minorities have the right, in line with the provisions of the Constitutional Court Law, to file a constitutional suit with that Court, if in its own opinion or as a result of some initiative of a member of a minority they consider that the rights and liberties of members of minorities as prescribed by the Constitutional Law and separate laws (Article 38 Paragraph 3) have been violated (Article 38 Paragraph 3). But still, from the provisions of the Constitutional Law, apart from a constitutional suit, no clear mechanism for protecting minorities from various forms of discrimination can be seen. In other words, it is up to the legislative arm to put the principle of the promotion of equal opportunities for minority groups of the population, one of the leading principles of the protection of minorities in the EU, into

some other laws and in this way to reinforce the mechanisms for the protection of minority rights. This has only been partially done in the Parliamentary Elections Law. Almost a year after the passing of the Constitutional Law, not much, then, has been achieved. The biggest job is still to come, since the national legislation has to be harmonised with the standards of constitutional law, and also with those of international and European law. Perhaps a simpler solution would be to adopt an overall anti-discrimination law.

MEASURES AND RECOMMENDATIONS

One of the main questions in the theory of human rights is that of the justification of human rights: why do human beings have human rights and which human rights do they have (Matulović, 1996)? For human rights to exist, there must be valid ethical criteria or principles that justify them. From this point of view it is necessary to find and understand the justification of the protection of minority rights, since they are also human rights. In other words, Croatia is not bound to protect minority rights only because this is required by the international community and is one of the conditions for membership in the EU. The only justification is that Croatia be built up as a democratic, multicultural and multiethnic society. Also, a justification is the constitutionally guaranteed right to ethnic equal rights, as well as the equality of each individual before the law, independent of race, skin colour, sex, language, faith, political or other conviction, national or social origin, wealth, education, social position or other features.

It is the duty of Croatia as a state to ensure the coexistence of all individuals irrespective of their national affiliation. Considering the number and proportions of national minorities in the territory of Croatia, it is essential to accept the specificities of individual minority communities vis-à-vis their cultural and historical diversity. In its activity programme for the period between 2000 and 2004 the last Government said: "The Government will remove all the obstacles that prevent the full civil integration of members of national minorities into Croatian society. With this objective, it will propose, among other things, appropriate solutions with which to ensure positive action in the election law so as to provide them, beside universal civil rights, special rights as well, such as the proposal and election of their own representatives". In the light of the holding of the fifth elections in Croatia since

it became independent, the members of minorities did have the right to vote for candidates on the minority list, but they did not have the right to vote at the same time for the other candidates, that is the parties and coalitions on the regular lists. Although the Constitution and the Constitutional Law on the Rights of National Minorities both provide for double voting, the Parliament rejected this in the last amendments to the electoral law. Minority members thus have an alternative: vote either for the regular, or for the minority list. In the next few years one will have to see how much the new Constitutional Law will contribute to the improvement of the position of minorities in society. It will be essential to make certain amendments to the current provisions so that they are as clear and unambiguous as possible. In any case, the Constitutional Law is an important advance in the protection of minority rights, both for Croatia and for other lands in the region. In this part Croatia should play a key role as factor of stability in the region, one of the essential conditions for EU integration. In the stability and association process, it is the regional stability factor that represents a very important political precondition for integration. In order to achieve positive moves, it will be necessary to draw up measures and recommendations to make this process faster and more qualitative. Of course, on the way there are bound to be certain barriers. Primarily we are thinking here of the political situation, of economic stability, but also of the awareness of each individual for the need to foster diversity and toleration in society. The Constitutional Law says that ethnic and multicultural diversity and the spirit of understanding, respect and tolerance help in the promotion of development. At the end, some recommendations for improving the position and rights of minorities in Croatia:

- harmonise national legislation in the area of minority protection with the Constitution, international and European law;
- pass a single anti-discrimination law to prevent discrimination against individuals on any grounds whatsoever;
- enable proportional representation of minorities in local executive bodies and bodies of national administration and judiciary;
- through amendments to the parliamentary elections law enable the existence of special lists for minorities during elections for representative bodies, with guarantee of double franchise;
- by statute enable application of special measures in cases when members of minorities are underrepresented (in employment for example);
- ensure the restitution of property confiscated in the war, or make sure of appropriate damage (courts to use summary procedures for restitu-

- tion cases, independently of whether they have been filed by the state attorney or the owner of the assets);
- enable the renovation of ruined houses and facilities if the returnees want to go back to them (and all of those who submit an application for renovation should be treated in the same way, irrespective of their ethnic origin) or ensure them appropriate damages in lieu;
 - ensure that government help is provided without discrimination on the basis of ethnic origin;
 - legally to enable owners of property to seek from the government or state damages in cases when the damage was the result of violence that the government was duty-bound to prevent;
 - enable the construction of educational and healthcare establishments as well as the employment of professional personnel in reconstructed and inhabited areas;
 - educated individuals, citizens, politicians, judges, attorneys, civil servants and media on the importance of promoting tolerance with respect to minority groups;
 - enable the functioning of a state of law and order – to process war crimes and other crimes (with respect to the constitutional principle of equality of all before the law during trials).

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- i* The International Covenant on Civil and Political Rights, the Declaration on the Rights of Persons belonging to National or Ethnic, Religious or Language Minorities, the European Convention for the Protection of Rights and Fundamental Freedoms, The European Charter on Regional and Minority Languages, the Framework Convention on the Protection of National Minorities, the Final Document from Copenhagen on the protection of minorities, the Document of the CEI for the Protection of Minority Rights. The Treaty of Amsterdam, 1997, which is a primary source of EU law, in Article 13, forbids every form of discrimination, hence also discrimination based on racial or ethnic origin and religious or other belief. Of the secondary sources of EU law the most important is the Directive concerning the application of the principle of equal treatment for all individuals irrespective of their racial or ethnic origin.
- ii* For more details see Andrassy, Bakotić, and Vukas (1995).
- iii* Minorities would be non-dominant groups of the population who want to have and to preserve their own ethnic, religious or language traditions or characteristics, different from those that are proper to the rest of the population of the same state. To this definition is added the condition of numerical strength, according to which such groups should be numerous enough to be able to preserve their own characteristics. This in fact ignores those minorities that should most be protected. But the biggest problem here is that minority matters are posed in different manners in different countries, so that it is difficult to find common principles and rules that meet all the conditions (Andrassy, Bakotić and Vukas, 1995).
- iv* Framework Convention for the Protection of National Minorities, European Treaty Series/157. Croatia has been a party to the convention since February 1, 1998. NN

- *Treaties 14/97. As of May 12 the Convention bound 35 states (not including Belgium, France, Greece, Holland, Turkey and the Ukraine).*
- v For more detail on this see: <http://www.europaparl.eu.int/workingpapers/libe/102/#top>.
- vi Consolidated versions of the Treaty on European Union and of the Treaty Establishing the European Community (2002) (2002/c, 325/01), OJ C 325/2, 12/24/2002).
- vii Directive 2000/43/European Commission concerning the application of the principle of equal treatment for all persons irrespective of racial or ethnic origin. *Official Journal L*, 180. 19/07/2000.
- viii Directive 2000/73/European Commission of the EP and the Council of the EU of September 23 on amendments to Directive 76/207/EEC of the Council on the application of the principle of equal treatment for men and women in employment, professional practice, promotion and conditions of work.
- ix European Network Against Racism (ENAR), speech by Bashy Quaraisy, chairperson of ENAR, Brussels, June 8, 2003.
- x Croatia signed the European Convention on November 6, 1996, and ratified it on October 17, 1998. It deposited ratification papers on November 5 and after that it was published in NN 18/97, annex: *Treaties*.
- xi In 1997 the Slovenes and Bosnians were expunged from the special list of minorities that appears in the preamble to the Constitution, which states that the "Republic of Croatia is founded as the nation state of Croatian citizens and the state of members of indigenous national minorities: Serbs, Czechs, Slovaks, Italians, Hungarians, Jews, Germans, Ukrainians and Ruthenians and others who are citizens of it." In spite of the amendments to the Constitution, the last of which come from 2001, these two minorities, like the Romany, are still excluded from the constitutional inventory of minorities (see Constitution of Republic of Croatia, NN 41/01). The Government's Office of Minorities was founded by an ordinance of December 1990, before the international recognition of Croatia as an independent state.
- xii In its report for March 1998, the Venice Commission repeated the importance of adopting the revised Constitutional Law and noted the negative effect that the suspension of large parts of the law had had on displaced persons and refugees that belonged to the minorities.
- xiii Amendments to the Law concerning Elections of Members of the Croatian Parliament, October 1999, say that 5 representatives (for minorities below 8%) will be distributed in the following way: Italians, Hungarians and Serbs have the right to one each; the Czechs and Slovaks one; and Ukrainians, Ruthenians, Jews, Germans and Austrians one. This reduced the representation of Serbs from 3 to 1 representative, and the Slovene and Bosnian minorities had not right to representation. This model of minority representation was applied in the elections of 2000, which resulted, according to the formula, in five minority representatives in the Parliament.
- xiv Croatia ratified the Framework Convention in October 1997 and submitted its first report in March 1999. In April 2001 the Consultative Committee published a view that was the basis for the resolution for the Council of Ministers of 2002.
- xv Adoption of the altered Constitutional Law is also a condition for Croatia to join NATO.
- xvi The Constitution guarantees members of all ethnic minorities freedom to express their ethnic affiliation, freedom to use their own language and script and cultural autonomy (Constitution Republic of Croatia, NN 41/01).
- xvii Between 300,000 and 350,000 Serbs left Croatia during the war of 1991-1995. There are no precise statistics about how many of them returned. Human Rights

Watch, 2003. *Croatia Fails Serb Refugees: Ethnic Discrimination Slows Refugee Return*. p. 10.

- xviii Among the provisions suspended in September 1995 was article 18 paragraph 1, which provided minorities that made up more than 8% of the total population in the census of 1981 proportional representation in the Parliament, Government and supreme judicial bodies. Only the Serbian minority was hit by this. The right to be represented at the national level for minorities that constituted less than 8% (had the right to elect a total of 5 MPs) remained in force as did provisions that provided for proportional representation in bodies of local self-government. Suspended too were provisions related to the foundation, functioning and international control of special autonomous districts in which the Serbs constituted a majority according to the census of 1981, and those for which the Human Rights Court was established.
- xix UN Charter (1945), General Declaration on Human Rights (1948), Convention of the Council of Europe for the Protection of Human Rights and Fundamental Freedoms (1950) and protocols accompanying this convention, the International Convention on the suspension of all forms of racial discrimination (1969), the UN Declaration on the Rights of Persons Belong to National or Ethnic, Religious or Language Minorities (1992), the Framework Convention on the Protection of National Minorities of the Council of Europe (1997), European Charter on Regional and Minority Languages (1992), CEI Instruments for the protection of Minority Rights (1994) and others.
- xx Article 7 of the Constitutional Law runs: "The Republic of Croatia ensures the realisation of special rights and freedoms of members of national minorities that they exercise severally or together with other persons that belong to the same national minority, and when this is determined by this Constitutional Law or a separate law together with the members of other ethnic minorities, particularly:
- using their own language and script, privately and in public use and in official use;
 - education in the language and script they use;
 - use of all emblems and symbols;
 - cultural autonomy by the maintenance, development and display of their own culture, and preservation and protection of all cultural assets and tradition;
 - right to manifest their own religion and the foundation of religious communities with other members of that religion;
 - access to public information media and carrying out the activity of public information (reception and dissemination of information) in the language and script they use;
 - self-organisation and association for the sake of attaining common interests;
 - representation in representative bodies at a national and local level and in administrative and judicial bodies;
 - participation of members of ethnic minorities in public life and in the management of local affairs via councils and representatives of ethnic minorities;
 - protection from all forms of activities that threaten or might threaten their survival, the attainment of their rights and liberties".

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