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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

Opinion 134/2000

DRAFT OPINION ON THE DRAFT CONSTITUTIONAL LAW ON THE RIGHTS OF MINORITIES IN CROATIA

prepared by the Secretariat on the basis of comments by:

Mr Franz MATSCHER (Member, Austria)
Ms Hanna SUCHOCKA (Member, Poland)
Mr Pieter VAN DIJK (Member, The Netherlands)
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Introduction

Having been asked by the Parliamentary Assembly to follow the developments in the revision and implementation of the Constitutional Law of 1991 on human rights and freedoms and rights of national or ethnic minorities in the Republic of Croatia, the Venice Commission considered, at its 43rd Plenary Session, the Constitutional Law of 11 May 2000 amending the Constitutional Law of 1991. In its Opinion [(CDL-INF (2000) 10)], the Commission found that the legislation in question considered lacked rules at the constitutional level to regulate or set out the framework of an effective participation of minorities in public life and rules pertaining to the establishment, functioning and competencies of bodies representing minorities at the local and national level. The Commission reiterated its availability to co-operate with the competent Croatian authorities with a view to preparing a new text of the Constitutional Law on the Rights of Minorities as requested by the Parliament of the Republic of Croatia.

On 21 July 2000, the Government of the Republic of Croatia forwarded to the Venice Commission for opinion a Draft Constitutional Law on the Rights of Minorities in Croatia [(CDL (2000) 62)].

The Venice Commission Rapporteurs, Mr Franz MATSCHER, Mr Pieter VAN DIJK and Mrs Hanna SUCHOCKA, and Mr Alain DELCAMP, Chairman of the Expert Committee of the Congress of Local and Regional Authorities of Europe in charge with the monitoring of the European Charter of Local Self-government, considered the draft law at a meeting held in Paris, on 1 September 2000 and subsequently on 22 September 2000, in the presence of Ms Lidija LUKINA, Vice-Minister of Justice, and Ms Sanja TABAKOVIC, President of the Council of National Minorities in Croatia.

[At its 44th Plenary Meeting (Venice, 13-14 October 2000), the Commission adopted the following opinion on the basis of the comments by the Rapporteurs]

1. General comment

The Commission is of the opinion that the new draft law constitutes an important step forwards in the protection of national minorities in Croatia. It provides a comprehensive and coherent framework for further legislative and regulatory action in the field of minorities' protection.

However, several aspects of the draft law need to be clarified and the Commission would stress, in this respect, that preparatory work on the draft law might take more time than expected.

The Commission underlines its support for this legislative operation whose positive outcome is of utmost importance. It reiterates its availability to further co-operate with the authorities in this sphere of work.

2. Legal effects of the new Constitutional law

The Commission observes that the draft Constitutional law does not clearly state which provisions of the Constitutional Law of 1991 are abrogated and which remain into force.

It finds that a clear statement in this respect is necessary as this is of utmost importance for legal security. Interpretation on the basis of the principle *lex posterior derogat priori* may be of some help but does not seem to offer the required security.

The Commission would rather agree with the approach which the Croatian authorities also seem to favour, which is to entirely replace the Constitutional law of 1991 with the new Constitutional Law, provided that the essence of rights enshrined in the Constitutional Law of 1991 as well as all elements of preceding laws and political commitments which it is desirable to retain will be re-introduced in the new Law. However, if this approach is followed, this should be clearly indicated in the draft.

Furthermore, the Commission finds that Article 30 of the draft Law (according to which "acquired rights cannot be restricted by the new law") needs further clarification. In particular, the question is raised as to whether this provision is likely to apply to rights contained in the Constitutional law of 1991. It is reminded in this respect that the 1991 Law contained a series of special status provisions, as well as reference to rights concerning proportional representation in Parliament but also in the Government and in high judicial bodies for minorities making more than 8%) before the amendments of 11 May 2000 (see also point 8 below). Article 30, as it stands, may give the impression that special status provisions are re-activated.

The Commission would suggest that the drafters should consider rewording Article 30 as follows: "The rights of national minorities acquired *by international agreements* before the date this constitutional act takes effect may not be restricted or changed by this Constitutional Act".

3. List of Minorities

A particular aspect of the effects of the new law on previous regulations concerns the list of minorities introduced in the amendments to the Constitutional Law of 1991 adopted in May 2000. It is reminded, in this respect, that the list of minorities introduced in May 2000 differs from the list of minorities already contained in the Constitution (as amended in 1997), whereas the draft Law contains no such list of minorities.

In the Commission's view, the absence of a list of minorities in the new draft should be positively assessed.

As the list in the Constitution appears to remain valid, the effects of this list should be carefully considered, as some minorities not expressly referred to in this list can be excluded from several entitlements, such as. guaranteed representation in the Sabor. In the Commission's view, the list of minorities in the Preamble ("historical foundations") of the Constitution, by virtue of its clearly indicative character - the word "and others" are included at the end of the list - should not have any legal effect on the rights granted to minorities.

4. Individual affiliation to a minority

The Commission stresses the importance of the provision of Article 1 para. 2 according to which each person shall have the right to decide freely about his or her affiliation to a national minority.

It notes however that the question of the means whereby the affiliation to a minority is expressed is not at all addressed in the draft Law. It should be made clear in the Law that it is for the individual to decide how this affiliation shall be expressed and that "objective" criteria for individual minority affiliation should be excluded, whereas the elements of minority definition should be met.

The Commission further finds that the question should be considered whether and to what extend the minorities' institutions should have the power to decide about the formalities of individuals' expression of affiliation.

The question of double minority affiliation should be addressed.

Finally, it should be made clear that this provision equally guarantees the right to change affiliation to a minority.

5. Definition of minorities

The Commission notes that the definition of minorities in Article 2 restricts this concept to "Croat citizens" only. Although this follows the definition contained in the Venice Commission proposal for a European Convention for the Protection of National Minorities[1], the Commission notes that the Framework Convention for the Protection of National Minorities does not contain any similar restriction and that the Human Rights Committee, in its General Comment 23, concerning Article 27 of the International Covenant on Civil and Political Rights, has admitted that protection granted under such provision extends to persons who "need not be citizens of the State party". The Commission also stresses that the High Commissioner on National Minorities has acted with regard to groups who did not have the citizenship of the State concerned - for example, Russians in Latvia and Estonia. The Commission would welcome a wording that would allow all persons who have a longstanding and genuine link with Croatia – for example, long term residence to be able to benefit from the protection granted to national minorities in the country.

In any case, the Commission underlines that it is expected that the rules and procedures for acquisition or confirmation of Croatian citizenship should be implemented in a simplified, speedy and flexible manner, allowing persons who were former residents or have close links with Croatia to be eligible for Croatian citizenship. The Commission refers in this respect to Resolution 1223 (2000) of the Parliamentary Assembly according to which the Croatian Government should ensure "prompt and flexible implementation of the citizenship law".

6. Effect of the principle of equality

The scope of equality enshrined in Article 1 para 1 should be clarified in order to make it clear that effective equality may require positive discrimination. This can be made in an explanatory report.

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[1] *Article 2 para 1 of the proposed Convention reads: "For the purposes of this Convention, the term "minority" shall mean a group which is smaller in number than the rest of the population of a State, whose members, who are nationals of that State, have ethnical, religious or linguistic features different from those of the rest of the population and are guided by the will to safeguard their culture, traditions, religion or language" (in "The protection of Minorities", Collected texts of the European Commission for Democracy through Law, Science and Technique of Democracy Vol. 9. See. also the Explanatory Report, ibid. pp. 29).*

7. References to special implementing laws

On several occasions (Articles 5, 7, 8, 9, 14 and 15 -18) the draft refers to special laws that shall implement the rights guaranteed in the Constitutional Law.

It is true that constitutional laws contain in principle only fundamental standards and leave detailed implementation provisions to the common legislator. However, in the case of the draft constitutional law under consideration, many provisions suffer from a total lack of any definition or guiding principles as to the contents of the rights guaranteed, thereby leaving entirely the substance of the right to the common legislator.

The Commission would therefore suggest that the draft makes it clear that the special implementation laws shall be compatible with the rights guaranteed in the Constitutional Law and shall not affect the very essence of these rights. Moreover,
The Commission would suggest the following:

- In Article 5 it should be made clear that restrictions or conditions in the free use of minority signs and symbols can only be valid where there exists a legitimate public interest thereto and that this may not occur in the private sphere.

- In Article 7, concerning publishing activities of national minorities or their members, it is unclear what the "special law" referred to will regulate. The Commission understands that this law should mainly regulate public subsidies to such publishing activity. If this is so, it should be made clear in the provision of Article 7.

- The rules concerning the use of minority languages and scripts in Article 8 are positively assessed. In para. 3 however, it is not clear under which conditions a minority may be entitled to official use of its language and script in areas where its members do not make up the majority of the population. Some indicative criteria could be included, such as those referred to in the Framework Convention, for example, the traditional presence of the minority in the region or significant number of its members.

- In Article 14, it should be clear that there is a right of persons belonging to minorities to establish their own minority language media. State regulation of minority language media should not affect the very essence of this right. Restrictions imposed in the exercise of the minorities' right of access to media should serve legitimate purposes and be necessary.

- Articles 15 –17 regulate freedom of association of members of minorities. The Commission understands that the aim of these provision is to further specify the Constitutional guarantee of freedom of association. However, in their present wording and structure the above articles leave room for interpretation that would restrict rather than specify the guarantee for freedom of association. On the other hand, it may indeed be necessary to grant minority associations a specific status; having regard to the role these associations may have in the designation of members of "minority self-government" bodies and of members of the special advisory body (provided for in Article 25).

8. Electoral rights

Articles 11, 12 and 13, which provide for electoral rights of minorities are positively assessed.

However, their implementation is left to special laws and the Rapporteurs find it necessary to include some further guidelines and guarantees in the text of the Constitutional Law.

This is in particular so for minorities other than the Serb minority, whose right to proportional representation is stipulated. The law should give some indication as to the criteria for the distribution of the 6 seats among the representatives of the other minorities. The Commission understands that the prevailing idea within the group of drafters is to distribute the remaining seats among the other minorities proportionally to their numerical importance.This approach may, however, lead to the exclusion of numerically smaller minorities and thus conflict with the general philosophy of the regulation aimed at ensuring a minimal representation for minorities.

The Commission has also taken note of the position of the Council of National Minorities according to which the seats for minorities' representatives in the Sabor should be 8, rather than 6, and that these seats shall be distributed among the representatives of 15 minorities, of which 3 shall have permanent seats and the remaining shall rotate. The Commission notes that this proposal presupposes the existence of a list of minorities.

The Commission acknowledges the difficulties that the drafters of the Constitutional law will face in their efforts to combine the need to correct proportionality by a guaranteed participation for minorities and the need to avoid establishing a list of such minorities. It underlines that before concluding the drafting of the constitutional law there should be a clear idea on the manner in which the provisions of this constitutional law will be implemented by the common legislator in the electoral legislation.

The same remarks can be made in respect of the right of proportional representation of minorities in local and regional bodies (Article 13)

9. <u>As regards the "minority self-government units" (Articles 19 to 22 of the draft)</u>

The Commission finds that the provisions on "minority self-government[2] units" are unclear and ambiguous and this may become an important source of dysfunction.

It is difficult to understand from the provisions in the draft how the "minority self-government" bodies would operate, although it is clear from the explanations given by the representative of the Croatian authorities that these bodies will co-exist, as consultative bodies, with local self-government authorities. In particular, the draft does not regulate how the "minority self-government" bodies will be constituted. Will they be elected and by whom? Who will participate in these elections? Which authority is entrusted with their organisation and in to what extent? What are the fields of competence of the minority self-government bodies?

The structure of the Chapter should be reviewed in order to clarify the scope and purpose of the various provisions and their relations. For instance, Article 19 para 1 seems to be an introductory declaration rather than a provision granting rights; therefore it should not be placed at the same level as other provisions guaranteeing specific rights.

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[2] *Following the explanations given by the Croatian authorities the Commission would suggest that the term "self-governing" or "self-organisation" be substituted for "self-government".*

The Commission would also recommend that, before concluding the drafting of this section, there should be a clear idea of its implementation through other laws, in particular through the law on local self-government.

Finally, the Commission refers to Recommendation 1201 (1993) of the Parliamentary Assembly[3] – in particular Article 11, which expresses the need that concentrated minorities have at their disposal *appropriate* local or autonomous authorities or to have a special status, matching the specific historical and territorial situation and in accordance with the domestic legislation of the state. As the relation between the local authorities and the minority self-government units is unclear and the competencies of the latter are not specified, it is still questionable whether the model of advisory bodies that the draft seeks to establish (a system comparable to the Hungarian model of personal autonomy) will satisfy in practice the requirements of the above recommendation.

10. Access to Constitutional Court

The Commission stresses that members of national minorities as well as associations, "minority self-government" bodies and, possibly, the advisory body provided for in Article 25 should have the right to bring before the Constitutional Court any issue as to the implementation or interpretation of the constitutional law.

This seems to be the case as far as associations are concerned, provided that they have acquired legal personality. However, it seems that the "minority self-government units" and the body to be established under Article 25 do not have this right. The Commission would recommend including a provision to this effect.

11. The Council of National Minorities

The Commission understands from the drafters' explanations that the advisory body provided for in Article 25 is, in fact, the Council of National Minorities. In this case, Article 25 would be the legal basis for the functioning of this body (which is still operating on a de facto basis).

The Commission welcomes this development and notes that it may be necessary to clarify this in the explanatory report so as to avoid the risk of creating a new organ in addition to the de facto existing Council of National Minorities.

12. Other issues and questions

Finally, the Commission makes the following textual suggestions concerning some provisions in the draft law:

- In Article 2: delete the words "A group of"
- In Article 6 para. 2 in fine add "and enjoy the same legal protection"
- In the title of Chapter III: delete the words "The bodies for the"
- Delete Chapter IV, as it makes part of Chapter III

[3] *This Draft Recommendation is expressly referred to in the Venice Commission's Memorandum of June 1997 concerning the revision of the Constitutional Law of 1991 (see CDL-INF (98) 7).*