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OBSERVATIONS ON THE CONSTITUTIONAL LAW ON THE CONSTITUTIONAL COURT OF THE REPUBLIC OF CROATIA

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Introduction

1. This paper, prepared on the instructions of the Secretariat of the European Commission for Democracy through Law, seeks to examine the Republic of Croatia's Constitutional Law on the Constitutional Court of 24 September 1999 and, in particular, to examine its powers and composition, its rules of procedure and the effect of its decisions.

Given the wide discretion exercised by states in such matters, this paper will not attempt to deal with burning issues of the moment, but will take as its basis the rules that are most widely recognised or in use within European state democracies for upholding the pre-eminence of the Constitution together with an independent, impartial and representative Court[1].

The paper will also, of course, be based on the provisions of the Croatian Constitution relating to the Constitutional Court [2]. Account has nevertheless been taken of the fact that this paper forms part of a more far-reaching study by the European Commission for Democracy through Law of constitutional and democratic reforms that are currently taking place in Croatia that might include constitutional revisions, particularly on those provisions of the Constitution that relate to the Constitutional Court.

To a lesser extent, observations will be made concerning the clarity or the internal cohesion of the instrument.

The possibility cannot be ruled out that problems of translation may have obscured the meaning of various provisions and that this has resulted in difficulties of comprehension and, perhaps, misunderstandings[3].

Powers of the Constitutional Court of Croatia

2. The competencies of the Constitutional Court of Croatia are set out in extremely broad terms in Article 125 of the Constitution, although, by virtue of Article 127, the rules, and in particular the rules of procedure, may be prescribed by the Constitutional Law on the Constitutional Court.

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1 Reference will be made, in particular, to the report made on 17 October 1997 by Mr J. Robert, at the time a member of the Constitutional Council of the Republic of France, Mr Zlynsky, at the time a judge of the Constitutional Court of the Republic of Czechoslovakia, and Mr Vandernoot, at the time an auxiliary judge of the Belgian Court of Arbitration, on *the Composition of Constitutional Courts*, adopted by the European Commission for Democracy through Law (CDL-JU (97) 34 rév. 2). In this paper, that report will be referred to as the "*Report on the Composition of Constitutional Courts*".

2 Articles 122-127.

3 The Constitutional Law has been examined in the English version (document of 20 June 2000 of the European Commission of Democracy through Law, *CDL (2000) 51).*

Moreover, the different aspects of these powers do not always appear to be mutually exclusive. Thus the review of "the conformity of laws with the Constitution" (Article 125, subparagraph 1) or "the conformity of other instruments not having legal force with the Constitution and the legislation" (Article 125, subparagraph 2) may include questions relating to "the protection of constitutional freedoms and human and civil rights" (Article 125, subparagraph 3) or to "jurisdictional conflicts between the legislative, executive and judicial powers" (Article 125, subparagraph 4). More often than not it is questions of the type arising under the last two areas of jurisdiction that give rise to such issues of constitutionality as are included in general terms under the first two areas of jurisdiction.

This method can result in imprecision as to the extent of the competencies of the Constitutional Court and doubts as to the precise jurisdiction of that Court. This might have major practical consequences, particularly as the rules for bringing a case before the court, the rules of procedure and the rules for enforcing decisions may vary from one jurisdiction to another. It is true that the Constitutional Law can attenuate these difficulties by being more specific as to these distinctions, but, on the one hand, it is vital for parliament itself to be able to act with a sufficiently clear awareness of its constitutional authority and, on the other hand, it may well be the case that this very law perpetuates some of the confusion found within the Constitution itself; such is, moreover, the case with the Constitutional Law of 24 September 1999, which contains different chapters on (a) reviewing the constitutionality of the laws and regulations (Chapter IV) and (b) supervising respect for fundamental freedoms and human rights (Chapter V) and the separation of powers (Chapter VI)[4].

The constitutional provisions relating to the competencies of the Constitutional Court are, in fact, strengthened through harmonisation with those governing the jurisdiction of other courts. Despite the pre-eminent position of the Constitutional Court in relation to other powers, and in particular in relation to judicial power, nothing is more detrimental to the authority of Constitutional Courts than conflicts of jurisdiction between them and other higher courts within the state.

These considerations should not on any account give the impression that the competencies of the Constitutional Court should be restricted; what is required is a better delineation of these powers with clearer lines of distinction.

They might even lead to a clearer affirmation of the monopoly of the Constitutional Court in upholding constitutionality, particularly in regard to the law, by preventing the lower courts from ruling on such issues without having first applied for a preliminary ruling from the Constitutional Court[5].

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[4] See paragraph 8 below.

[5] Article 57 provides a good illustration of the risk of conflict between courts on account of the maintenance by the lower courts of competing powers to review constitutionality. If a clear distribution of functions as between the lower courts and the Constitutional Court is adopted, provisions such as Article 57, which is only of relevance in the event of competing jurisdictions between types of court, could then be revoked.

3. The competencies set out in the subparagraphs 5, 6 and 7 of Article 125, relating respectively to the accountability of the President of the Republic, the review of political parties and of elections and referenda, appear to have been drawn up in such a way as to avoid the pitfalls mentioned earlier. It is noted that in this passage the text referring to the last of these powers is careful to specify that its scope is limited to "electoral disputes, which do not fall within the jurisdiction of the courts".

As for the final area of jurisdiction set out in Article 125, ("the Constitutional Court shall exercise such further activities as are laid down by the Constitution"), this would appear redundant precisely because of the other provisions of the Constitution that attribute powers to the Court. The first sentence of the article might more appropriately be expressed: "Without prejudice to other powers granted under the Constitution, the Constitutional Court:".

4. It might, perhaps, be better to restrict the first four areas of jurisdiction set out in Article 125[6] by inclusion of the following:

- instruments that might be the subject of complaints before the Court, specifying from which public or private authorities such instruments might emanate (laws, regulations, instruments made by the President of the Republic, instruments made by local government, judgments, individual administrative documents, etc?);

- the terms of reference in relation to which such review is exercised (the Constitution, the Law, the Constitutional Law on Human Rights and Rights of Ethnic or National Communities or Minorities within the Republic of Croatia[7]), distinguishing between these terms of reference according to the type of action that is being reviewed[8].

5. Consideration should be given here to the breadth of the Constitutional Court's competencies. Perhaps the emphasis should be on the constitutional review of laws, allowing other courts to determine the validity of subordinate legislation, administrative action and judicial decisions. Such a sharing of jurisdiction between the Constitutional Court and other courts might be implemented through a system for stating a case whereby courts or, where appropriate, the court of last instance, including the Supreme Court, would be required to refer an issue of constitutionality to the Constitutional Court as soon as it arose. Presumably appeals against judgments of last instance would only be brought

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[6] These competencies are as follows, in their present form: "conformity of laws with the Constitution", "conformity of other instruments not having legal force with the Constitution and the law", "the protection of constitutional freedom and human and civil rights", "conflicts of jurisdiction between the legislative, executive and judicial powers".

[7] Or the legislation that will replace it.

[8] For example, where the law is the subject of review, the terms of reference will be the Constitution and possibly other higher legal rules. If regulations are being reviewed by the Court, the term of reference may be the actual Law.

before the Constitutional Court on points of constitutionality. Thus the Court would be spared an excessive workload and would consequently be able to concentrate on essentials, while maintaining its supremacy in reviewing issues of constitutionality.

The Constitutional Law of 24 September 1999 also contains a provision along similar lines to these: by Article 35, § 2, conferring jurisdiction on the court of justice for interlocutory applications involving regulations relating to the Constitution and the legislation. This makes it all the more imperative to harmonise its competencies and those of the Constitutional Court in regard to regulations, failing which there may be a divergence of jurisprudence.

At structural level, in order to facilitate the peaceful coexistence of different types of court, such a system should contain requirements for the sources from which some constitutional judges are to be appointed: it should be mandatory for a certain proportion of them to be from the Supreme Court or the higher administrative courts.

Conversely, in relation to the terms of reference which the Court is to uphold, consideration should be given to including international instruments on human rights, including those on the protection of minorities, to which the Republic of Croatia is a contracting party. Many Constitutional Courts include these within the "constitutionality block". The drafting of a new law would make it possible to incorporate these encouraging changes within an instrument of positive law.

6. If the power to subordinate legislation in relation to the law and to the Constitution is to be maintained, it would be helpful to provide that the Court may of its own motion override an unconstitutional law. Such power may be inferred from judicial practice, but it is preferable, in the interests of certainty of the law, to make specific provision for this, in pursuance of Article 241 of the EEC Treaty, which concerns the invalidity of a European regulation.

7. The Constitutional Law could, in fact, be enabled by the Constitution to determine more clearly than now is the case the provisions defining the powers of the Constitutional Court, and in particular the authorities that may refer a case to it, the procedure for referring a case to it, the procedure for, and effect of, its decisions. In its present form, Article 127 of the Constitution only enables parliament, apart from the conditions for appointing and dismissing judges, to establish the procedural time limits, the procedure itself and the effects of the decisions of the Court. Furthermore, within such provision, the terms "guarantees the protection of constitutional, human rights and civic freedoms and governs various important issues in order to fulfil the tasks of the Constitutional Court and to carry out its functions effectively" do not appear to have any place in such a constitutional provision within enabling legislation. If such terms mean that these principles should be observed when the Constitutional Law on the Constitutional Court is adopted, they would appear to be self-evident and in any event should not be set out on the same basis as the spheres in which parliament is authorised to carry out the constitutional provisions concerning the Court.

8. As already mentioned, the observations that have been made on the constitutional provisions relating to the Constitutional Court naturally apply to the implementing constitutional Law of that Court.

It is for this reason that, in accordance with the subdivision set out in the Constitution itself, Chapter IV of that Law is devoted to the upholding of laws and regulations (Articles 34 to 58 of the Law) and Chapter V is concerned with the protection of constitutional freedoms and human rights (Articles 59 to 76). Under the terms of Article 59, § 1 (referred to in Chapter V), anybody may make a constitutional complaint if he considers himself to be the victim of a violation of constitutional law as the result of a "decision by a judicial or administrative authority or another public authority". The concepts of administrative or other public authority are particularly broad and include organs of the legislative and executive powers, that is to say, the very organs whose actions (laws and regulations) can be the subject of a complaint on grounds of constitutionality or possibly legality by virtue of Chapter IV, and in particular Articles 34 onwards.

Article 59 of the Constitutional Law does indeed provide that if other remedies exist for preventing the violation of constitutional rights, a constitutional complaint (Chapter V) can only be made to the Court after such initial remedies have been exhausted.

If this provision is interpreted as excluding recourse to the constitutional complaint (Chapter V) where other remedies are available before the Constitutional Court itself, it would to some degree deal with the difficulties, as the constitutional complaint (Chapter V) would then appear as ancillary to the common law remedies[9]. This makes it all the more important to define precisely the scope of these common law remedies and to be more specific as to the nature of this subsidiarity: in particular, the question arises as to whether the constitutional complaint (Chapter V) is only available in cases of lack of jurisdiction the part of another court or another authority or where all other procedures have failed, even on the merits. In fact, even if such an interpretation is adopted, the risk of an overlap between the various powers of the Court cannot be ruled out entirely, as under Article 59 § 4 of the Constitutional Law, the Court may exceptionally hear a constitutional complaint (Chapter V) even before other remedies have been exhausted.

If Article 59 § 2 is different, and only relates to appeals before jurisdictions other than the Constitutional Court, the problem again arises of the aggregation of the powers of that Court. It is, moreover, necessary to prevent the constitutional complaint (Chapter V) from appearing to be a supplementary remedy following the failure of the common law procedure before the Constitutional Court.

9. These criticisms also apply to a certain extent to Chapter VI of the Constitutional Law on the conflicts between the three powers to which a law or regulation may give rise, otherwise subject to the common law procedure described in Chapter IV of the Law.

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[9] It would then only relate, for example, to individual actions.

10. To conclude this issue of the constitutional complaint, (Chapter V), if the intention of the Croatian Constituent Assembly and Parliament is to provide a means of appeal against individual action, it would be better to state so clearly, specifying which are the authorities whose acts can be challenged.

In the same way, if the intention is to make the Constitutional Court available to private individuals, this should be stated, with the imposition, where appropriate, of conditions for this means of appeal, especially a requirement that the applicant should have a personal, direct and specific interest to assert, or submitting it for a preliminary examination as to admissibility before an ordinary court; a preliminary sifting process could also be established within the Constitutional Court in order to prevent abuse of this means of appeal.

As a general conclusion on the description of the powers of the Constitutional Court of the Republic of Croatia, consideration should be given to:

- the differences between the various types of jurisdiction of the Court;

- a better description of those competencies, particularly in respect of the actions that might be challenged and the terms of reference;

- clearer authority within the Constitution for parliament to legislate on these competencies and the procedures relating to them;

- the distinctions between the powers of ordinary courts and the Constitutional Court;

- the organisation of a system for stating a case between ordinary courts and the Constitutional Court;

- a possible reduction in the review of the law by the Constitutional Court, possibly coupled with a power to hear appeals against judgments where their constitutionality is challenged;

- the conferring on the Constitutional Court of power to review compliance by the Republic of Croatia with its undertakings in the matter of fundamental freedoms, human rights and the protection of minorities.

The composition of the Constitutional Court

11. The following observations relate to the composition of the Constitutional Court, and in particular the conditions for appointing judges, their taking up of office, the length of their term of office and their dismissal and the representation of socio-political pluralism and minority groups within the Court, and incompatible offices.

The conditions for appointing judges

12. Article 5 § 1 of the Constitutional Law of 24 September 1999 imposes as the eligibility requirement for appointment as a constitutional judge "a lawyer with at least fifteen years' legal experience, who has distinguished himself in scientific or professional work or in public service". This wording is particularly vague and leaves much room for interpretation, particularly as it is aimed at the quality of professional work or public service.

These conditions should be rendered more specific, and conditions set that are capable of being verified, such as university lecturer, senior law officer of the High Court or the Public Prosecutor's Department, etc. Article 5 § 3 goes some way to meet this, but imposes this type of condition only "particularly' and not generally.

The taking up of office, the length of the term of office and the dismissal of constitutional judges

13. Article 6 § 2 of the Law is unfortunately drafted in that it authorises the House of Representatives to carry over in an indeterminate way the date of the taking up of office of a *judge terminating the term of office of his predecessor*.

14. It is quite paradoxical to require a constitutional judge, as in Article 7, to swear allegiance to the very law that he is authorised to censure. Such a type of *oath* is nevertheless quite commonplace[10].

15. Article 10 of the Law appears to contain a contradiction, in that in its first paragraph it lists three causes, which would appear to constitute an exhaustive list of reasons, for *dismissing a judge*, while in the second paragraph it actually specifies further causes which can be decided by the Court itself.

Furthermore, this interpretation does not state with sufficient clarity the reason for these additional causes.

If it relates to *disciplinary offences* justifying dismissal, there should be some mention of this in the first paragraph and a description in paragraph 2 of how the disciplinary procedure is to be carried out within the Court; the description should be worded in sufficiently broad terms to identify the instances where the authority and dignity of the Court may be put in jeopardy.

It would be advisable to provide a specific enactment for disciplining judges. Provision should be made for sanctions other than dismissal in order to guarantee a scale of punishment that is proportionate to any misdemeanours that might come to light. Such an instrument should harmonise with the present provisions to this effect, which should also be consolidated, particularly Articles 3, § 5, 11, §§ 1 and 2 and 12 § 1[11]. Needless to

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[10] Such is particularly the case in Belgium, the country of the author of this report.

[11] It may be noted in passing that there are two provisions dealing with the suspension of a constitutional judge who is charged with a criminal offence, namely Articles 3, §5 and 12, §1. These

say, discipline cannot be removed from the exclusive control of the Court itself, a guarantee of its independence[12].

It is by no means clear, either, why it is necessary to notify the President (Speaker) of Parliament of the additional causes for the dismissal, as set out at the end of the present article.

16. In Article 11, §§ 3 and 4, it should be made clear that it is the Court itself that initiates the procedures for determining the *permanent incapacity* of a judge or the president. It is not clear why, according to paragraph 5 of the same article, a majority decision by all the judges is required for determining the incapacity of the president but not for the incapacity of a judge.

17. On the subject of the *expiry of the term of office* of a judge, Article 13 § 1 is less than explicit. It is not possible to fathom, in the absence of information as to the conditions in which Croatian Members of Parliament retire, which constitute the terms of reference of the system that is being examined here, why the mere expiry of the term of office is not sufficient in order to put an end to a judge's functions as a matter of law, with possible provision for a restricted extension of the term of office in order to conclude the hearing of a case that is in progress, to conclude the making of a report that has not been completed or pending the taking up of office of a successor.

In more general terms, there should be provisions enabling the Court to continue its functions even in the eventuality[13] of the procedure for appointing judges being frustrated as the result, for example, of political stalemate or tension between the Court and the organs of the other powers. It would be advisable, for example, to commence the appointment procedure several months before the expiry of the term of office and, as has been suggested, to authorise a judge whose term of office is about to expire to continue in office until such time as his successor takes up office[14]. It has even been proposed that the Court should be allowed to propose candidates to the House of Parliament where the latter is unable to nominate or appoint a judge[15].

18. Neither the Constitutional Law nor the Constitution states whether or not the eight-year term of office for a constitutional judge is subject to renewal.

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provisions should be consolidated in order to avoid any distortion of meaning and to safeguard the coherence of the wording.

[12] See on this point the *Report on the Composition of the Constitutional Courts, cited above, paragraph 7.*

[13] Such an eventuality is, fortunately, highly improbable, but it would be unwise to rule it out completely, as the experience of a number of Courts has shown.

[14] See, on this point, the *Report on the Constitution of Constitutional Courts*, cited above, at the end of paragraph 4.3.

[15] *Report on the Constitution of Constitutional Courts* at the beginning of paragraph 4.3.

It is generally agreed that, from the point of view of the independence of members of the Court, taking account of the connection that might be made objectively or subjectively between the way in which the judicial functions are carried out and the hopes or expectations of a further appointment, "the system to be preferred would provide for relatively long terms of office with no opportunity for re-election or only one possible further term of office"[16].

The representation of socio-political pluralism and minority groups within the Constitutional Court of Croatia

19. In states that are multicultural in character or within which the integration of minority groups is under way, such pluralism is frequently reflected within the Constitutional Court[17]. At the conclusion of its Report on the Constitution of Constitutional Courts, the European Commission for Democracy through Law even expressed itself in more general terms, describing the essential pluralism of our democracies:

> "Society is necessarily pluralist - a field for the expression of various trends, be they philosophical, moral, social, political, religious or legal. Constitutional justice must, by its composition, guarantee independence with regard to the various interest groups and contribute to the establishment of a body of jurisprudence which is mindful of such pluralism. The legitimacy of a constitutional jurisdiction and society's acceptance of its decisions may depend very heavily on the extent of the court's consideration of the different social values at stake, even though such values are generally superseded in favour of common values. To this end, a balance which ensures respect for different sensibilities must be entrenched in the rules of composition of these jurisdictions"[18].

It was, moreover noted, in the course of carrying out the research for this report, in which the Courts participated, that *de facto* representation of the Serb minority has been adhered to as far as the Constitutional Court of Croatia is concerned[19].

It should be added that, according to the report adopted on 16 June 2000 by the European Commission for Democracy through Law at its 43rd Plenary Meeting[20], Article

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16 *Report on the Constitution of Constitutional Courts*, cited above, at the beginning of paragraph 4.2. At the end of that report, it is stated, echoing the wording quoted above: "Terms of office of constitutional judges should not be allowed to coincide with the parliamentary terms. One way of achieving this can be by long terms of office, or office until the age of retirement. In the former case, reappointment would be possible either only once or indeed not at all" (paragraph 10).

17 See, in this connection, the *Report on the Constitution of Constitutional Courts*, cited above, in paragraphs 2.2, 2.3 and 10.

18 *Report*, paragraph 10.

19 *Report*, paragraph 2.2 and annex, under the heading "De facto representation of minority groups (Q4.1)".

18 of the Constitutional Law of 4 December 1991 on *Human* Rights and Rights of Ethnic or National Communities or Minorities within the Republic of Croatia, suspended by the Constitutional Law of 20 September 1995, but reintroduced by the Constitutional Law adopted by the Croatian Parliament on 11 May 2000[21], provides, in particular, that minorities representing over 8% of the population must be represented within the higher courts, which would include the Constitutional Court. Even if this provision will only effectively enter into force after the holding of a census scheduled to take place towards the end of 2001[22], particular attention must be given to this provision.

The imperatives set out above, and, in particular, the importance of the role played by the Constitutional Court in the protection of minorities, require this to be taken into account in drawing up the rules for the composition of the Court. In order to reflect pluralism, Article 4 could provide that a qualified majority should be required (for example two thirds) for the nomination and appointment of judges, which would, moreover instil a culture of consensus in relation to the composition of the Court[23]. As far as the protection of minorities is concerned, consideration could be given to guaranteeing the presence of a minimum number of judges associated with such minorities.

Incompatible offices

20. Article 9, § 2 of the Law is drafted in such terms that while only academic appointees would be able to combine part of their teaching and research commitments with those of a constitutional judge, a judge would not be entitled to apply for a reduction in his academic duties after being appointed to the Court. The latter possibility should also exist.

Article 9 § 3 of the Law, which excludes from the list of incompatible offices scientific activities, or specialist knowledge or membership of certain organisations, is too wide in its ambit and could give rise to abuse and challenge.

On these two issues, the Court should no doubt be allowed to assess to what extent teaching, research and specialist functions could be combined with the duties of a constitutional judge. As far as membership of an organisation is concerned, freedom of association would preclude this being subjected to prior permission, even on the part of the Constitutional Court, but in any event, the terms “and others” should be removed and

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[20] *Opinion on the Croatian Constitutional Law amending the Constitutional Law of 1991, adopted by the Venice Commission at its 43rd Plenary Meeting (Venice, 16 June 2000) on the basis of the Report prepared by Mr Franz Matscher, Mrs Hanna Suchocka, Mr Pieter van Dijk, (CDL-INF (2000) 10).*

[21] *Loc. cit., pp. 2 and 5.*

[22] *Report cited above, loc. cit.*, pp. 5 and 7. See Article 12 of the Constitutional Law of May 2000.

[23] Such a system should always be evaluated bearing in mind the risk of the stalemate that it could also produce in the procedure for appointing judges (see, on that question, No. 10 below), but it is self evident that such a danger could be controlled by means other than those that would at the same time annihilate the mechanisms for the protection of minorities in the legislation on the Constitutional Court.

it should be stipulated that membership should be compatible with the requirements of detachment that are indissolubly linked with the status of a constitutional judge and that they cannot involve any publicly declared political affiliation.

21. More specifically, as far as *affiliation to a political party* or political involvement is concerned, Article 15 of the Law contains a particularly draconian provision, amounting to a radical prohibition. To the extent that it undermines the very essence of freedom of association, this wording is open to discussion, even if the case-law of the European Court of Human Rights allows states a large measure of discretion in relation to expediency[24].

Merely as a point of interest, it is observed that according to the Belgian Court of Arbitration, a provision prohibiting police forces from expressing political opinions was held to be unconstitutional unless it was interpreted to the effect that only political stands and activities that are distinctly public in nature could be prohibited[25].

General procedural provisions (Chapter III of the Constitutional Law)

22. Article 16, § 4 of the Law contains a provision by which an *application brought by error before another body* is deemed to have been lodged within the time limit. If this broad provision is to be maintained, this concept of "another body" should be worded more specifically, as its vagueness could lead to interpretations outside the Court's control. It could at least be specified that it relates to a court and that the application should clearly indicate the intention of its author to subject it to judicial review by the Constitutional Court. Even in such an eventuality, there is the risk that an application brought before another court need not necessarily be interpreted as coming under the jurisdiction of the Constitutional Court. It is, in fact, quite usual for issues of constitutionality to come before a judge. The same is also true of administrative bodies, particularly in respect of petitions placed before parliament.

23. Under the wording of Article 17, at the end of § 2, in certain cases instruments may be submitted to the court in *languages* other than Croatian in Latin script, without there being any requirement for the judgment itself to be delivered - or at all events, translated - into the language of that document. There should be a further requirement for the parties to be allowed to use that language in court hearings and for both the documents and the spoken words of court proceedings to be translated for them. Linguistic *minorities* would thus be guaranteed proper treatment[26].

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[24] ECHR, 20 May, Rekvényi/Hungary.

[25] Judgment No. 62/93, of 15 July 1993.

[26] The only provision of the Framework Convention on the Protection of National Minorities of the Council of Europe which has a direct bearing on the linguistic aspects of the treatment of minorities in court is in fact Article 10, § 3, which is confined to cases of arrest and criminal charges, but account should be taken of the provisions in force and under preparation of the Croatian Constitution and legislation on the protection of minorities, particularly in its linguistic aspects (see on that question the *Opinion on the Croatian Constitutional Law amending the Constitutional Law of 1991, adopted by the Venice Commission*

Perhaps a distinction should be drawn between the various cases, and provision of a system of the kind that has just been suggested should be made only for individuals and institutions in parts of the country in which the use of another language is officially allowed or required, or where the Cyrillic alphabet is in use, on the understanding that where a minority represents a significant proportion within a part of the country, it should be allowed to use its language.

If the proceedings are of a criminal nature, or if they have a determining influence on criminal proceedings, the system should be extended to cover all languages, even foreign languages. This is a requirement under Article 6 of the European Convention on Human Rights, and in particular paragraphs 3 (a) and (e) of that provision[27].

At a more basic level, the legislation on the Constitutional Court should be harmonised with the legislation that is currently under preparation for the protection of minorities - linguistic and other - and in particularly in regard to the setting up of a right of recourse by bodies representing minorities. This could involve the Council for National Minorities or bodies acting in the name of particular minorities. This question could be more easily resolved by using the system of individual appeal, which could be extended to all physical persons, particularly associations representing minorities and other groups acting for collective interests[28].

24. Article 18 paragraph 2 contains another broad provision requiring the Court to refer back to their authors any procedural instruments lacking in *clarity*. This system should be examined in order to ascertain whether it does not in fact result in extra workloads for the Court and its staff that would threaten the handling of other matters within a reasonable time period.

25. There is a sibylline ring to Article 19, which states that the proceedings are *conducted* by "the" judge of the Constitutional Court. Presumably this refers to the reporting judge assigned to each case: if this is so, the wording should be revised accordingly.

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at its 43rd Plenary Meeting (Venice, 16 June 2000) on the basis of the report prepared by Mr Franz Matscher, Mrs Hanna Suchocka, Mr Pieter van Dijk, CDL-INF (2000) 10).

[27] See the previous note in relation to national minorities.

[28] For example, the case law of the Belgian Court of Arbitration sets out as follows the conditions in which a voluntary association asserting a class interest may have access to the Court: "the objects of the association have to be of a particular kind and, consequently, distinguishable from the general category of interests; the judgment concerning which the appeal is brought must have some bearing on those objects; the objects must be in fact pursued, as evidenced by the actual activities of the association; the association must be able to demonstrate consistent activity, both in the past and in the present; and the collective interest must not be limited to the individual interests of members.".

26. Article 20 permits the exclusion of the public from "proceedings". Presumably this relates to hearings[29].

If this is the case, it should be made clear, with an indication of what reasons would justify such a measure. It should remain the exception to the rule. In any case, when a case referred to the Constitutional Court has a bearing on civil or criminal proceedings within the meaning of Article 6 § 1 of the European Convention on Human Rights or, *a fortiori*, it is itself of such a nature, the rule for a hearing *in camera* must be compatible with the following wording of that same provision, which limits exclusions "from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice".

27. In the matter of *costs*, covered by Article 22, it should be specified whether the Court is entitled to apply the exceptional arrangements to lawyers' fees as well as to court fees proper under this provision. For the sake of equality, it should also be specified on the basis of what criteria the Court can decide to apply these exceptional arrangements to costs.

28. In a number of European states, barristers do not have to justify their authority to represent their clients before the court, save in exceptional circumstances. Article 23, § 2 of the Law takes no account of this concept in requiring the barrister's authority to be substantiated. Unless this condition forms part of legal practice in Croatia, a more flexible approach should be applied to this issue.

29. Article 24 is drafted very succinctly for an issue as important as that of *the powers of injunction* of the Court. It would be improved by specific mention of the main procedural points for granting injunctions, and in particular their form, means of notification, time limits, penalty for non-compliance, etc.

30. Article 26, on the *conditions for adopting decisions*, prompts the following observations.

It is a matter for regret that its very first paragraph should speak in terms of "votes", whereas every court should be endeavouring to reach a consensus, the Constitutional Court[30] above all others; the vote should be used only as a last resort.

This same provision would furthermore appear to be worded too radically in requiring a majority of "all judges" without anticipating the possibility of judicial

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[29] It is true that the Constitutional Law contains provisions on the participation of members of the public at court "sessions" and not merely at hearings proper. These parts of the Law are criticised below in paragraph 42.

[30] This becomes all the more imperative inasmuch as the Court is required to play an important part in protecting minorities.

vacancies within the Court or inability to sit on the part of some judges[31] or even the possibility that is, in fact, mentioned in Article 51, § 2, of not all the judges being present[32].

31. The present legislation concerning the Court obliges it to sit in plenary session, that is, with a complete panel. The question arises of whether in the interests of efficiency the Court might in fact sit with a smaller bench of five or seven judges sitting in rotation, or, indeed, three judges for lesser cases. The president, who would preside over all benches[33], could in all circumstances require matters to be heard in plenary session. To ensure pluralism and the protection of minorities, a number of judges forming a significant minority should also be empowered to require such plenary sessions.

Perhaps inspiration could be drawn from the system established under Article 64 concerning Chapter V of the Constitutional Law, concerned with the protection of constitutional freedoms and human rights, which provides for the latter type of case to be heard by a bench of five judges who, if they are unable to reach a unanimous decision, refer the matter to a plenary session of the Court. This particular system should nevertheless make provision in any event for a case to be heard in plenary session, having regard to the role of the Court in safeguarding pluralism and protecting minorities[34].

32. The distinction between paragraphs 4 and 5 of Article 27 is not immediately apparent: it would appear that the former relates to a mere dissension, that is not fundamental in character, and the latter is concerned with an objection, with all that that implies. If this is the case, then the wording should make it clear.

On a more fundamental level, the question arises as to the lawfulness of the possibility available to the judge, and indeed, the obligation placed on him in the former instance, to hand down a *dissenting opinion* or the reasons for his objection. As may be observed at the European Court of Human Rights, the practice of dissenting opinions undoubtedly contributes to a depth of reflection on human rights before, during and after the deliberation of the matter in question; it may even be stated that a fair number of dissenting opinions anticipate changes in the law. Such a practice, however, is conceivable only in counts whose authority is sufficiently established and where expressions of disagreement cannot be analysed or understood by the outside world (private individuals, the press, politicians, etc) as a sign of weakness. It also requires both great discipline and extreme caution on the part of its authors, whose written opinions must be worded in such a way as to give no basis for such criticism. The

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31 See too Article 26, § 6, which deals with withdrawal by a judge for cause.

32 Article 51, § 2 in fact authorises the Court to sit with a quorum of a majority of its members.

33 He might well delegate this function in certain cases to other judges, according to a system objectively determined in advance.

34 It is conceivable that there might be no judge representing a minority interest among the five judges comprising the original bench and those judges coming to a unanimous verdict without taking into account that minority interest.

obligation to render a written dissenting opinion may also have the effect of discouraging certain judges from departing from the majority view. It is therefore advisable to give careful consideration to the advisability of maintaining this system, particularly on the basis of the evaluation of its practice by the Constitutional Court of Croatia to date.

One fundamental point that must be taken into account in this connection is that of the central role to be played by the Constitutional Court in the protection of minorities while at the same time safeguarding national unity[35]. In this connection, the efforts to reach a broad consensus within the Court in adopting decisions could be thwarted by the prospect, and even more by the requirement, of handing down dissenting opinions. Furthermore, if such dissident opinions came from one or more judges who are associated with one or more minorities or defending a point of view akin to that held by such minorities, they would risk being given undue prominence and increase still further the risks of social discord between the majority and certain minorities.

These observations apply also to Article 51, § 3 of the Law.

33. Article 26, § 6 of the Law sets out only one cause of *disqualification* from hearing a case, namely participation in the legislation in question or in a regulation forming the subject of the decision. Other reasons, in particular family or other connections with the parties, should also cause judges to abstain from sitting.

34. In Article 30, there is no apparent difference in meaning between paragraphs 2 and 3 insofar as they specify the administrative and central government organs that are authorised to *enforce* the decisions of the Court.

On this same question, without prejudice to the arguments that will be developed below as to the nature and the effects of the Constitutional Court[36] paragraph 5 of that provision authorises the Court to determine the manner in which the decisions and orders of the Court are to be carried out. In certain cases, in particular in cases of setting aside or rescission, the effect flows from the decision itself, and public authorities do not have any discretion in the matter. Such possibilities should be included in the wording.

35. Article 31 appears to be superfluous.

36. The use of the words “as a rule” in Article 32 makes it possible to nullify this provision concerning the time limits in question. It would be better to set a time limit (for example, six months or a year) while authorising the Court to extend this time limit in exceptional circumstances, with a limit to the number of extensions allowed.

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35 The Preamble of the Framework Convention on the Protection of National Minorities firmly places that instrument within the context of territorial integrity (see too Articles 2 and 3 of the Framework Convention).

36 See paragraphs 48 to 51 below.

Powers of the Court in judicial review of laws and regulations (Chapter IV of the Constitutional Law)

37. Reference is made principally to what has already been set out in points 2 to 10 above on the various powers of the Constitutional Court both in the Constitution and in the Constitutional Law of the Court.

Other observations relating to the powers of the Court in judicial review of laws and regulations are set out below.

38. In Article 34, the status of applicant conferred on the *ombudsman* is not very well defined. The wording of the text gives the impression that this high official can only act in certain cases "as provided under Article 93 of the Constitution […]". That provision would not appear to give a clear indication in relation to him. His powers are defined in very broad terms by Article 93 of the Constitution as "protecting the constitutional and legal rights of individuals vis-à-vis government departments and organs of public service", which does not indicate with the precision required of a procedural instrument the exact nature of his powers before the Court.

39. Article 35, § 2, which confers upon the criminal courts the power to apply the *objection of illegality* through interlocutory review of regulations, while appearing totally pertinent, does not seem to have any place within the constitutional law of a Constitutional Court save in restricting the powers of the criminal courts and the Constitutional Court. As to the substance, reference may be made to the specific observations on this provision and on the advisability of reserving for the Constitutional Court the power to review the legality and constitutionality of regulations[37].

40. Article 36 of the Law allows anyone to *propose* to an institution so empowered that it bring an action before the Court. Such a provision is not strictly necessary if it is confined to stating one of the ways in which these institutions may be advised of an infringement of the Constitution. It appears pointless unless these create an actual right, which would indeed appear to be the case. Apart from the fact that there is some doubt as to the nature and scope of such a right, the Law should in any case specify the effects of referring a matter to such an institution in order to invite it in turn to refer it to the Constitutional Court, in particular with regard to the information of the applicant concerning the decision taken, on the obligation to give reasons for the decision, on the possibility of an appeal against a refusal, on its possible implication in the proceedings brought before the Court, etc.

As already mentioned above, the question arises whether it would not be better to replace this system with a clear individual appeal mechanism, with a few safeguards, such as the requirement of an interest, the filtering process through a court, an initial sifting process within the Constitutional Court, etc[38].

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[37] See above, paragraph 5.

[38] See above, paragraph 10.

41. Article 40 deals with the *adversarial* character of the proceedings before the Court in a manner that is both summary and inadequate.

It is unfortunate that applications are not notified as a matter of course to the authors of the instrument in question and that such notification takes place only at the request of the reporting judge. Where appropriate, a rule could be introduced for notification coupled with an exception where, in the view of the reporting judge, the request is manifestly inadmissible, or indeed, manifestly ill-founded, or where it clearly does not fall within the jurisdiction of the Court. If that method were chosen, it would have to be incorporated into the preliminary sifting process as suggested elsewhere[39]. But even in such an eventuality, care should be given in following the rules of equality of arms, both in regard to the applicant and in regard to the authority implicated, especially when the proceedings are linked to a civil or criminal case or where they involve a civil right or a criminal charge within the meaning of Article 6 of the European Convention on Human Rights.

After the reply of the authority concerned has been served, the applicant should in turn be notified of it in order to exercise the right of reply.

Article 41 should also be reconsidered in order to ensure that both parties have the right to present their arguments and to ensure that the rules of procedure are set out in advance, so that they are widely known before the appeal is brought.

42. Accordingly, if a provision such as Article 47, providing for the holding of consultative sessions, is maintained, it would be advisable to remove any confusion between the ordinary proceedings, which are open as a matter of law to the parties to the proceedings, and those consultative sessions, which are open on a purely optional basis to other authorities, associations, experts, etc. Article 48, § 3, compounds the confusion by not distinguishing between the parties to the proceedings and other parties joined to the proceedings. These provisions do not distinguish clearly between ordinary hearings and consultative sessions.

Again in the interests of protecting pluralism and minorities, provision could be made for a number of judges forming a significant minority should also be able to convene consultative sessions, provided, of course, that these are continued.

43. In Article 42, clarification is needed concerning the cases in which time begins to run either on the lodging of the application with the Court, or on posting it by registered mail. The question arises as to whether in the interests of certainty of the law it might not be better to insist on service by registered post and for time to run from the date of posting.

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[39] See paragraph 10 above.

44. Article 43, which authorises the Court to *suspend* the enforcement of instruments adopted on the basis of the law or regulation that is the subject of the complaint, requires:

- the addition, as a cumulative ground for suspension, of the existence of a substantial basis for complaint, the mere risk of irreparable harm being insufficient;

- the provision as a further ground for suspension of the adoption by the author of a nullified document and identical document containing the same defects[40];

- further power to suspend the law and regulation themselves, and not merely action taken in enforcing them.

45. The decision to introduce an *oral phase* into the procedure was taken on the basis of Croatian authorities. If such a possibility is nevertheless retained, as in Article 44, the decision should not be left solely to the president or to the reporting judge, but a number of judges forming a significant minority should be authorised to require it, particularly in the context of the role played by the Court in safeguarding pluralism and protecting minorities.

There would be justification too for excluding the public and the press from hearings other than that in which the report of the reporting judge is presented and the parties make oral submissions. That phase should be carefully distinguished from the deliberation itself, which calls for complete confidentiality. Article 45 should be redrafted to allow for this.

Paragraph 4 of this provision should include telecommunications media other than radio and television.

In Article 48, § 4, the final words ("if it is of an opinion that the conditions for this exist") should, I believe, be omitted: they contain an inference that where, on the other hand, one of the parties fails to enter an appearance, the Court would be unable to hear the matter, which would constitute a denial of justice. Where one of the parties fails to appear, the Court is free to draw inferences from that fact, such as withdrawal or compromise, etc but bearing in mind the rights of the defence, such devices should be handled with caution. If necessary, they could be included in the Law itself[41].

46. Article 46, which is specifically concerned with the deliberations, would be improved by a provision for the written report to be served on the judges in advance. It goes without saying that they should be given access to all documents in the proceedings.

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[40] See below in paragraph 47, the remark concerning Article 52.

[41] For example, the presumption of waiver of the action should the applicant fail to appear would put him on notice that such action could be taken in the case of default.

47. Article 52 contains a rather surprising rule authorising the judicial review of a law or regulation even where it has been the subject of judicial review previously. The doctrine of *res judicata* in relation to the judgments of the Court should prevent this.

Whether or not to keep this provision depends on what happens in relation to the observations concerning the insertion of a new reason for suspension of an action that is the subject of a complaint before the Court in the case of the adoption of a law or regulation identical to that declared void by the Court[42] and the nature and effect of decisions that the Court may make[43].

48. That last question is specifically dealt with from Article 53 onwards.

These provisions are unclear as to the distinction that should be drawn between the concepts of declaration of nullity, repeal and setting aside, that they tend to use somewhat interchangeably. There is, moreover, no indication in these instruments as to when the Court makes a declaration of nullity, when it repeals and when it sets aside.

Repeal is a device that should be confined to cases where it is the author of the document himself who decides to withdraw it forthwith from the legal system, contrary to a declaration of nullity, where the initiative comes from a third party authority. A declaration of nullity normally operates *ex tunc*, with retroactive effect, but provision can be made that in exceptional circumstances, and in particular for reasons of certainty of the law, the Constitutional Court has power to regulate the effects of the nullified instrument for whatever period it shall determine. Such would appear to be the thrust of Article 54, § 2 of the Law authorising the Court to balance the main circumstances against the legal and constitutional requirements in deciding whether to repeal or to annul. Basically the options would appear to be correct, but, in the absence of any further information on the finer points of Croatian law and the legal vocabulary in use, it would appear best to keep with the concept of the declaration of nullity *ex tunc*, with appropriate wording to secure the exceptional retention of the effects of the nullified document.

49. If the option of the declaration of nullity *ex tunc* is retained - and it would appear that it is already possible, if not obligatory, in the cases mentioned in Article 54, § 3[44], the rules already incorporated in Article 56 of the Law should be maintained, enabling extraordinary rights of appeal to administrative and legal tribunals to secure the withdrawal of individual administrative or judicial action taken in implementation of the annulled instrument. Such means of redress should, however, be extended to regulations and not merely to individual action, as already provided by Article 56, § 2, and paragraph 3 of this provision should be more clearly worded.

The right of extraordinary individual recourse should not be subject to time limits in relation to the instrument rendered invalid by reason of a declaration of nullity in

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42 See paragraph 45 above.

43 See paragraph 48 below.

44 See below.

respect of the law or regulation upon which it was based but it would, of course, be possible to set a time limit running from the date of publication of the decision by the Court itself, such publication taking a form identical to that of the nullified instrument.

If rights of extraordinary individual recourse are introduced, as in Article 56, § 3, it is hard to understand why paragraph 4 of this same provision also renders ineffectual acts of execution and application which have not been the subject of extraordinary individual recourse. Only appeals can as a general rule give rise to the voiding of an act; any other means gives rise to legal uncertainty.

An examination of the consequences of a Constitutional Court decision, particularly in a civil case, would appear to relate more to the civil courts than to the Court itself, as stated in Article 56, § 5 of the Law.

50. In Article 54 § 3, which appears *to require the Court to make a declaration of nullity*, it is hard to understand why laws and individual actions are not subject to the same system.

It is, moreover, difficult to see the point of the second item of this provision requiring the Court to make a declaration of nullity "if certain individuals, groups or associations are placed in an unjustified position of privilege". If this refers to the principle of equality or the rules for the protection of minorities, these form an unquestionable part of the fundamental freedoms and human rights that are already mentioned in the first item as giving rise to a mandatory declaration of nullity by the Court. The maintaining of this distinction might give rise to doubts as to the inclusion of the principle of equality and the rules for the protection of minorities within fundamental freedoms and human rights.

51. Article 55 concerns the effect of repealing a law or regulation challenged before the Court on the proceedings before it.

Apart from the fact that this effect is dealt with only perfunctorily, it might well, at a more basic level, give rise to confusion. It would appear preferable not to confuse the legislative and regulatory proceedings with the proceedings before the Constitutional Court. The latter only rules on the instrument before it, without including any repeals or amendments: this does not preclude the Court from taking account of them in assessing whether the applicant's interest is still enforceable or has ceased to exist.

The jurisdiction of the Court in the protection of constitutional freedoms and human rights (Chapter V of the Constitutional Law)

52. The basic observations in paragraphs 2 to 10 above cast some doubt as to whether Chapter V of the Constitutional Law of 24 September 1999 on Fundamental Freedoms and Human Rights should be retained. If it is retained, it should be redrafted in such a way as to avoid the jurisdictional overlapping that has already been mentioned. I shall confine myself to the following, somewhat peripheral, remarks.

In Article 63, § 1, the words "as a rule" should be removed. They infer that there are other exceptions to the principle of application of the action appealed against than that of paragraph 2 of these provisions, which should, moreover, state that it is by way of exception to the rule stated in paragraph 1.

Along the lines of what has already been said in relation to Article 43[45], over and above the condition of not being contrary to public interest and the risk of further harm, there could be added the further condition of sufficient grounds.

53. Article 64 requires the case to be heard by a bench of five judges; if they are unable to reach a unanimous decision, they refer the matter to the plenary session of the Court. This latter system should still allow for the possibility in each case, even where there is a unanimous decision, for a case to be referred to a plenary session, having regard to the role of the Court in safeguarding pluralism and protecting minorities[46].

54. Articles 68 and 71, which list the reasons for rejecting a constitutional complaint, appear superfluous. They cite only instances where it is obvious that a decision of this kind should be taken. Here duplication should be avoided with Article 31[47].

55. Article 70, which enables a finding of unconstitutionality to be extended to closely associated instruments, appears somewhat summary, particularly in not providing for the possibility for the author of the closely associated instrument to give a prior explanation.

56. The above observations on the nature and effects of decisions of the Court may be applied to Article 72, which makes use of the concept of the declaration of nullity[48]. It is, moreover, uncertain whether, as provided by the wording, it is still open to the author of the instrument to adopt a new instrument under a new procedure. If the defect of unconstitutionality is radical, a mere declaration of nullity could well suffice. The rule according to which the procedure must be renewed before the author of the nullified instrument is present, moreover, in both Articles 72 and 73, § 2.

57. It is not clear why Article 73, § 1 of the Constitutional Law requires reasons for a declaration of nullity and not for a dismissal of the complaint.

58. Article 75 provides at subparagraph one for the proceedings to terminate in the event of the complainant's death. Such a repressive measure appears too radical. Where

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45 See paragraph 44.

46 It would be sufficient for there to be no judge representing a minority interest among the five judges comprising the original bench for these judges to reach a unanimous verdict without taking into account that minority interest.

47 An observation to this effect has already in fact been made, in relation to Article 31, in paragraph 35 above.

48 See paragraphs 48 to 51.

civil interests in particular are at stake, there is justification for allowing the successors, and in particular the heirs, to continue the proceedings commenced by the deceased.

Jurisdiction of the Court in the conflict of jurisdiction between the legislative, executive and judicial powers (Chapter VI of the Constitutional Law)

59. The preliminary observations set out in paragraphs 2 to 10 above raise doubts as to the appropriateness of preserving Chapter VI of the Constitutional Law of 24 September 1999 on conflicts of jurisdiction between the legislative, executive and judicial powers. If it is kept, it must be redrafted in such a way as to avoid the jurisdictional overlaps mentioned above.

Jurisdiction of the Court in reviewing the constitutionality of programmes and activities of the political parties (Chapter VIII of the Constitutional Law)

60. Among the criteria allowing the Constitutional Court to ban the work of a political party is the threat to the unity or the territorial integrity of the Republic of Croatia. It is well known that these concepts are sometimes interpreted in such a way that even internal demands by a section of the population are regarded as constituting such an infringement. In order to avoid a stumbling block of this kind, it should perhaps be stated that the Court exercises this jurisdiction to safeguard international standards for the protection of minorities to which the Republic of Croatia is a contracting party, as defined by the Council of Europe's Framework Convention for the Protection of National Minorities, other conventions of the Council of Europe, Article 27 of the International Covenant on Civil and Political Rights and the instruments of the SOEC.

Jurisdiction of the Court in Elections (Chapter IX of the Constitutional Law)

61. Article 88, and in particular paragraph 2, appears unclear as to the rules of procedure for cases based on election disputes.

Under Article 89, the appointment of three judges should take place according to an objective and impartial rotation system. Even if this bench of three judges is unable to reach a unanimous decision, the possibility should be retained, in all cases and consequently even where they reach unanimity, to refer a matter to a plenary session, having regard to the role of the Court in safeguarding plurality and the protection of minorities[49].

Miscellaneous questions

62. The new law will also have to include provisions on staff, assistants, registrars, archivists and court staff, particularly in regard to their conditions of employment, staff

[49] It would be sufficient for there to be no judge representing a minority interest among the five judges comprising the original bench for these judges to reach a unanimous verdict without taking into account that minority interest.

and disciplinary regulations, etc in keeping with the rights of such individuals and the independence of the Court.

The final provisions should make arrangements for judges and staff already in office as well as for cases in progress and should repeal the old law; this device would appear more satisfactory than the vague interpretation derived from Article 93 of the Law of 24 September 1999, which would repeal the old laws only to the extent that they do not conform to the new Law.

Conclusion

63. The method adopted in preparing this report was the drawing up of observations based on the structure of the Constitutional Law of 24 September 1999, except for those relating to the basic criticisms, set out at the beginning of the report, concerning the jurisdiction of the Court[50].

Fundamental observations are intermingled with others of a more peripheral nature. Apart from those relating to jurisdiction, the emphasis should be on the importance of more precise procedural rules, particularly on the hearing of all sides of the case, on the possibility of a preliminary sifting procedure and on the need to clarify the nature and effects of declarations of nullity, repeals and setting aside.

It has also been repeatedly suggested, both in relation to the composition of the Court and to the referring of cases to it, as well as its method of deliberating and, indeed, aspects of its jurisdiction, that more account should be taken of the fundamental role of the Constitutional Court in the protection of minorities.

The progress of democracy in Croatia will no doubt clear the way for upholding the pre-eminence of the Constitution and international standards of human rights and the protection of minorities.

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[50] See paragraphs 2 to 10.