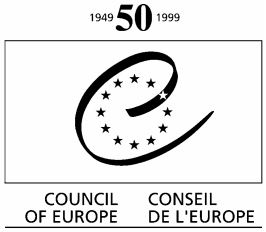

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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS ON THE CONSTITUTIONAL ACT ON THE CONSTITUTIONAL COURT OF THE REPUBLIC OF CROATIA

by

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THE CONSTITUTIONAL ACT ON THE CONSTITUTIONAL COURT OF THE REPUBLIC OF CROATIA

COMMENTS

General comments

The Constitutional Act under consideration (the "Act") is the fundamental legislative definition of the position of judges of the Constitutional Court of the Republic Croatia, conditions and terms for instituting proceeding for the review of the constitutionality and legality, procedure and legal effects of its decisions, protection of constitutional freedoms and human rights and other important issues for the Constitutional Court of the Republic of Croatia ("CCRC"). As such, it should only contain the really fundamental issues related primarily to the Croatian constitution. From that point of view, the content of the Act is, to a certain extent, unbalanced, because it includes regulations fundamental in nature (Article 1 and the subsequent ones), as well as very detailed provisions that have no place in a constitutional act. But because the constitution does not envisage the adoption of an "ordinary" statute, the constitutional act must refer to all issues about which the public needs to be informed (if they were included in the internal proceedings regulations according to Article 94 of the draft, the requirement of a public nature would not be met).

From the content point of view, a modification of some types of proceedings important for the process of European integration is to be recommended, e.g. the proceeding on measures necessary for the implementation of a decision of an international court. The same is true about, e.g., the modification of the disciplinary responsibility of judges and their exclusion from rulings on issues in which they may be one of the interested parties, about the status of the participant and the subsidiary participant, the definition of the tasks reserved for the reporting judge and to his/her assistant, the definition of the urgency of the matter by the Constitutional Court, the possibility to impose an administrative measure.

The draft of the Act is unnecessarily "generous" in places, and if passed, may cause the CCRC to be choked with an avalanche of cases. At the same time, it is excessively formalized in other parts, which might slow down or even paralyse the expeditiousness of the CCRC (for details, please see Specific Comments). I think that the legal assistants' position is inadequate. They are only consultants and as such should not be able to influence the decisions taken. It is therefore not acceptable to have them present cases at sessions (Article 46 (2)) or sign decisions (Article 74).

The system used in the draft of the constitutional act is acceptable.

Specific comments:

I GENERAL COMMENTS

Article 2
This most probably is supposed to mean "the principle of public procedure" for cases heard by the CCRC; such a statement is too general and fuzzy (e.g. because it uses the term "work").

Furthermore, I recommend that the provisions of Articles 20 and 44 (par. 2), i.e. the possibility to exclude the public from the proceedings, be incorporated in Article 2.

Our experience shows that the possibility to conduct hearings with the public excluded is to be recommended, provided that the parties involved agree with it.

I believe that it should also be stated here that the CCRC makes its decisions in plenary sessions and in councils (panels).

Article 3
I suggest that the wording of conditions for the detention of a judge without the approval of the Constitutional Court be reconsidered (i.e. if he/she has been caught in the act of committing a criminal offence which carries a penalty of imprisonment of five years – it does not say whether that is the maximum or the minimum sentence).

II CONDITIONS FOR THE ELECTION OF JUDGES OF THE CONSTITUTIONAL COURT, ELECTION OF JUDGES OF THE CONSTITUTIONAL COURT AND TERMINATION OF THEIR OFFICE

Article 4
The method for electing judges of the CCRC proposed in Par. 2 may pose a problem from the point of view of the judges' independence of the legislative body and of the need to relatively quickly "install" the judges of the Constitutional Court. In this respect, it seems better to use a system where the judges are appointed by the President of the country on the basis of a proposal submitted by one or the other chambers of the parliament).
It would also be good to make a reference in this place to what the Constitution says about the number of judges, or to re-state the number of the judges.

Article 5
In Par. 1 a mention should be made of the clean record principle and thus also of his/her character qualifications.

Article 7
If the judges are elected as proposed, they should take the oath before the chairman of the chamber that elected them. The fact that they are to take their oath before the President of the Republic suggests the use of the combined method for electing them (by the parliament and the President).

Article 10, Pars 1 and 2, Article 12, Pars 1 and 2
Non-uniform terminology that obscures the meaning of the text: relieved, removed, suspended. That is particularly true about a judge being permanent relieved of office when permanently incapable of performing his/her duty. For that reason I recommend that the introductory part of Article 10 draws a distinction between the possibility of relieving a judge and removing him/her.

Article 11, Par. 1
The period proposed is too long, and it might seriously hamper the operation of the court.

Article 11, Par. 5

Consider the possibility of setting the same quorum for the removal of a judge (on the basis of the *par inter pares* principle). Moreover, this provision seems superfluous in view of Article 26 Par. 1.

Article 13, Par. 2
The text proposes the same conditions for retirement and for conditions for judges who served their full term of office. The retirement according to Par. 2 should perhaps be offered only subject to serving at least half the term of office.

III PROCEEDINGS OF THE CONSTITUTIONAL COURT – GENERAL PROVISIONS

Article 16 (and related Articles 41 and 42)
The distinction between the "application" and "proposal" alternatives is not clear enough (Article 38) and that may lead to unnecessary complications, particularly in Section IV, Articles 41 and 42. Besides, the wording of the provisions referred to is too formalistic (particularly Article 41), thus posing a risk of delays, reduced expeditiousness of the CCRC, etc. For that reason I recommend a simplification, or the use the possibility of a refusal (in reference to Article 41 Par. 1).

Article 17
Some more terms appear that may obscure matters even more: terms "written request", "proposal" and "constitutional complaint" in Article 16 Par. 1, and terms "written statements", "proposals" and "information" in Article 17 Par. 1. Non-uniform vocabulary is also evident in other articles (e.g. Article 32).

Article 23
A legal representative, who should be an attorney, is probably meant here. It might be useful to stipulate that the use of attorneys is obligatory (a necessary filter for an urge to appeal to the CCRC).

Article 31
A more detailed description in a separate part of the Act reviewed should follow. I recommend that a wording based on the experience of the Czech Republic be used, i.e. the possibility of rejecting a proposal (without a factual discussion), e.g. if the proposal has been submitted by a person obviously not authorized to do so, if the defects in the proposal have not been put right, if the proposal is inadmissible, if not all the possibilities of remedies have been exhausted yet, or if the proposal is obviously ungrounded.

Article 32
The term of 1 year is not realistic and should not be specified at all (also because the provisions set no penalties for non-compliance).

Article 33

It is not clear what procedural legislation is meant. In view of the inadmissibility of analogies in the penal law, it is to be recommended that the cases for the use of the penal legislation be stated explicitly (e.g. Section VII).

IV REVIEW OF THE CONSTITUTIONALITY OF LAWS AND THE CONSTITUTIONALITY AND LEGALITY OF OTHER REGULATIONS

Articles 34 and 35
The possibility of presenting the request only through the Supreme Court is very restrictive in my opinion and I recommend that the same possibility be given to all courts of justice. At the same time, it is necessary to take into account the development of the proceeding before general courts of justice, and not to terminate the proceeding but only suspend it. In the present version it is not clear whether the Supreme Court is obliged to present the request, or whether it is left to the Supreme Court's discretion, and its opinion need not necessarily correspond with the opinion of the lower court.

Article 36
Par. 1 might pose a real threat of clogging the CCRC with requests for abstract reviews of the constitutionality from natural as well as legal persons. I recommend that a link with a constitutional complaint be stipulated (see comments to Article 63).
Par. 2 gives too much political power to the CCRC. The possibility that the court itself might institute proceedings should be an exception (i.e. in connection with a constitutional complaint in a specific matter, if the complaining party herself has failed to present a request for an abstract review).
Another risk containing in par. 2 is: the case will lose its character of a dispute about constitutionality of statutes before the CCRC if proceedings are instituting for an abstract ex offo review.

Article 37, Par 2 and others
Again I wish to point out the problem of terminology. In this case, the distinction between the terms "to annul", " to invalidate" and, from previous articles, "to repeal" is not clear.

Article 39
The procedure described in this article will need to be replaced with a standard work timetable approved by the CCRC plenum. The decision cannot rest with the president of the Court only.

Article 40
I recommend that in Par. 1 the term "may send" be replaced with "shall send". The period of 60 days is much too long. The court should decide without unnecessary delays in 30 days at the latest.

Article 41
I recommend that you reconsider the need for publishing the information about the newly instituting proceedings in the Official Gazette.

Article 42

If you are going to make a distinction between the day on which the proceedings are instituted and the day the request was sent by post, it is sufficient to say that the proceedings shall be considered instituted on the day when the Court received the request. If the proposed change in Article 36 is accepted, the provision of Article 42 (2) will be superfluous.

Article 44, Par. 1
From the practical point of view, it would be good if the reporting judge's report were submitted to all the judges and not to the president of the Court only. In this way, the judges could prepare for the discussions in the plenary session in advance.

Article 46, Par. 5
It might be good to add to the provisions of this paragraph that the new reporting judge is to be appointed by the president.

Article 47
The character of the "consultative session" is not explained, and it is not clear whether it is in the stage of presenting evidence. If the consultative session is not a part of the proceeding, it should probably be held as a closed session. This is another reason why Par. 2 should include an explicit statement to the effect that proceedings are open to the public if the Constitutional Court does not rule otherwise.

Article 51
Par. 1 may slow down the processing of cases by the CCRC. Will the separate session always be open to public? It seems to mean that the public is excluded from consultations and voting. In view of Article 26 (1), the provisions of Par. 2. are superfluous.

Article 52
It is not clear whether the principle of the *rei iudicatea* obstacle is fully respected in respect to the concrete provision. At the same time, it cannot be ruled out that, in a specific case, the constitutionality of a statute may be reviewed repeatedly according to its different applications (under the condition that the previous review did not result in an abolition of that provision for its unconstitutionality).

Articles 55 and 56
It is not clearly defined whether a decision by the CCRC will have the "*ex tunc*" or the "*ex nunc*" effects.

Article 56
I recommend that the situation described in Par. 1 be rephrased as explicitly another reason for the renewal of the penal procedure, and not as its analogy.
In Par. 2, it is not clear why a criminal procedure should be applied, although by analogy only, on matters that are clearly non-criminal in character.
The provisions of Par. 5 will only serve to increase the workload for the Constitutional Court. The responsibility for damages should be passed on to the corresponding state body. The Constitutional Court should take decisions in these matters - if the case has been reopened – only on the basis of a new (repeated) constitutional complaint.

Article 57
The clash with the procedure described in Article 35 is obvious. From the structure of the review of constitutionality of statutes it follows that a court of justice cannot refuse to apply the regulation because of unconstitutionality without asking the Supreme Court to present the case to the Constitutional Court. Otherwise another provision, an explanatory one, would need to be added to the Act.

V. PROTECTION OF THE CONSTITUTIONAL FREEDOMS AND HUMAN RIGHTS

Article 59
It seems that the provisions of Par. 3 are superfluous in view of the principle stated in Par. 2.
I recommend that conditions for an exception in Par. 4 be described more accurately, and that they be alternatively extended to also include a situation when the importance of the intervention is more general in character and it exceeds individual interests of the person submitting the complaint.

Article 60
I consider the period in which a constitutional complaint may be submitted as too short. I suggest that the beginning of the period be set alternatively for cases when the law does not allow the submission of any complaint (the violation was not caused by a decision). In such cases, the beginning of the period should be set at the day when the event complained about took place.

Article 61
You may wish to consider the possibility that the constitutional complaint will need to also contain a truthful description of the most important facts, identification of evidence that the plaintiff believes clearly documents what he is trying to prove, and what provisions of the Constitution have been infringed and how.

Article 62
It would be useful to be more accurate in the wording because as it stands now, it probably means the restitution of the term, rather than an unlimited restitution to the original state.
I think that Par. 3 is superfluous (the same conclusion follows from the nature of the term set in Par. 1).

Article 63
In relation with the suggested restriction of the possibility to submit a proposal for an abstract review (see comments to Article 36), I recommend that there is a possibility of combining the constitutional complaint with a proposal for the abolishment of a statute that was applied in the proceedings. In that situation the court would interrupt its proceedings about the constitutional complaint and the proposal would be decided by the plenary session of the CCRC. When the plenum has taken a decision about the constitutionality of the statute in question, the council (panel) would continue in the proceeding about the complaint. This provision should be stated in a separate paragraph or article.

Article 64

The provisions in Pars 1 and 2 pose a risk of reduced expeditiousness for the CCRC. The reporting judge will probably need to make a preliminary decision whether the council (plenum) will base its decision on Par 1 or on Par. 2. That is to say he will be called upon to make a preliminary conclusion about the character of the constitutional complaint.
The same risks are involved in Pars 13 and 14.

Article 65
In relation with the comments to Article 64, it might be worth considering the possibility of stipulating that the reporting judge will make a decision about some of the complaints himself/herself, e.g. if complaints submitted too late, if the defects have not put right by a deadline, etc. (in that case it would be necessary to remove a part of the authorization of the Constitutional Court according to Article 68).

Article 68
It is necessary to better define the reference to Article 59 (4) because the exception covers only that case (and not Article 59 as a whole).

VI
In the title of Section VI and all of its articles, the term "resolving disputes of powers" would be more suitable than "resolving jurisdictional disputes".

Article 77, Pars 2 and 3
In view of the fact that a request to resolve a jurisdictional dispute (disputes of power) may also be submitted by a party whose interest has been violated, it would not be good to link the term only to the learning that another body has accepted the jurisdiction in the matter in question, but – alternatively – also to the point in time when the violation of interest occurred.

VII PROCEEDINGS ON THE IMPEACHMENT OF THE PRESIDENT OF THE REPUBLIC OF CROATIA

Article 80
Some thought should be given to the wording of penalties to be used if the CCRC answers affirmatively the question of the president's liability, or, rather, if the CCRC arrives at the conclusion that the constitution has been violated by the president (e.g. removed from his office as president).

VIII CONTROL OF THE CONSTITUTIONALITY OF PROGRAMS AND ACTIVITIES OF POLITICAL PARTIES

Article 82
Is a section of a political party a legal person?

IX CONTROL OF THE CONSTITUTIONALITY AND LEGALITY OF THE ELECTIONS AND THE NATIONAL REFERENDUM AND THE ELECTORAL DISPUTES

Article 90, Par. 2
The term "in a private session" is probably used to mean "a closed session" or "in camera".

Article 92
The reference should be made to Articles 84 to 91 only (i.e. not including Article 92).