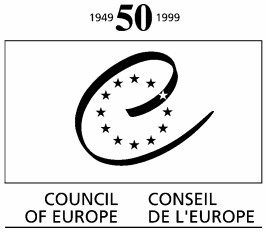

Strasbourg, 27 November 2000
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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT CONSOLIDATED OPINION ON THE CONSTITUTIONAL LAW ON THE CONSTITUTIONAL COURT OF THE REPUBLIC OF CROATIA

Based on the comments by:

Mrs Ivana JANU (Substitute Member, Czech Republic)
Mr Pierre VANDERNOOT (Belgium)

I. Introduction

1. Upon the request of the President of the Constitutional Court of Croatia, Mr S. Sokol, the Venice Commission was asked to prepare a legal opinion on the Constitutional Law on the Constitutional Court of the Republic of Croatia (Doc. CDL (2000) 51).

2. Mrs Janu and Mr Vandernoot were designated as rapporteurs on this issue. The following consolidated opinion is based on their comments that have already been transmitted to the Croatian authorities.

3. [The Venice Commission discussed and adopted the opinion at its 45th Plenary Meeting in presence of Mr Sokol. It was underlined that the Constitutional Law on Constitutional Court of the Republic of Croatia is conform to democratic standards applied by most European States.]

4. The following report summarises the observations made by rapporteurs in their separate opinion and the discussions held during the Plenary Meeting.

II. General comments

5. The Constitutional Law on the Constitutional Court aims to define the position of this institution in the Croatian legal system and the status of judges, to institute procedures for the review of the constitutionality and legality, to describe the legal effects of decisions, the protection of human rights and fundamental freedoms and to settle a number of other issues.

6. The very first comment that one could make is that the text is very detailed for a Constitutional Law: together with really fundamental issues it describes in detail different procedures. This approach leads to a number of omissions, which could be problematic for the efficient work of the Court. Although this legal approach does not seem to create difficulties in current practice, the Constitutional Court could have more freedom to regulate its own procedure.

7. In spite of the very detailed description of certain types of proceedings, the distinction between different competences of the Court could be better defined. Article 125 of the Constitution of Croatia gives the description of different fields of competence of the Court. The Law on the Constitutional Court of Croatia is aims to give the details of how these competences are carried out by the Court. Nevertheless, there are still certain issues that are not clear in the text (see below).

5. The Constitutional Court does not only deal with constitutional issues but appears to be the “guarantor” of the hierarchy of all norms. This may in the long run overburden the Constitutional Court. In this light the extension of the competence of the Constitutional Court in issues of control of constitutionality of norms could be reconsidered. It might be wise to entrust it with the power to control the constitutionality of laws and leave the control of administrative acts

and decisions to other jurisdictions ("courts of justice" as they appear in the text of the Law). This proposal is supported by **Article 35** Para 2 of the law, which gives the right to courts of justice to "*determine that the regulation other than the law, which is to be applied, is not in accordance with the Constitution or the law*", and, on the basis of this determination, not to apply that regulation and to "inform the Supreme Court thereupon". The Supreme Court in accordance with **Article 34** of the law can refer this issue to the Constitutional Court. There could be, for example, a system where competences of the Constitutional Court and other high jurisdictions are distributed in such a way that the Court would be a last-instance jurisdiction on issues of conformity of different acts to the Constitution. Other courts would refer to the Constitutional Court only in cases when they consider that the provision of a certain act clearly breaches the Constitution and the intervention of the Constitutional Court is absolutely necessary.

6. The text could be amended with provisions aimed at implementation of the decisions of international jurisdictions, especially in the field of human rights. The role of the Court in the field of implementation in Croatia of different norms of international instruments on human rights, minorities etc., to which Croatia adhered ,could also be clearly stated. The Law could even provide for a specific procedure in this respect.

7. Considering the importance of the role of the Constitutional Court in the protection of minorities the Council of National Minorities, whatever its status, should have the right to refer this issue to the Constitutional Court.

8. Another general issue of importance is the protection of minorities by the Constitutional Court. The Constitutional Law of the Republic of Croatia of 4 December 1991 on human rights and fundamental freedoms and on national or ethnic minorities establishes that minorities that represent more than 8 % of the population must be represented in high jurisdictions[1]. The latter should include, in principle, the Constitutional Court. This provision is not reflected in the Law on the Constitutional Court.

9. As for the structure of the text, certain articles are not clear from the point of view of terminology. This is the case, for example, of Articles **10 and 12, 16 and 41 – 42, 17 and 32**. These terms should be better defined in order to avoid any possible confusion.

III Some comments on concrete articles of the Law[2].

A. *Composition of the Constitutional Court and status of judges (Articles 4 – 15).*

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[1] The Venice Commission has underlined the importance of integration of minorities and their broad participation in the work of different state bodies, including the Constitutional Courts. For this issue see « The composition of constitutional courts », Collection : Science and technique of democracy, N°20. Venice Commission, December 1997.

[2] For more detailed analysis of the constitutional law on the Constitutional Court of the Republic of Croatia see docs CDL (2000) 96 and CDL (2000) 97.

10. The definition of a necessary professional background for being elected judge at the Constitutional Court defined by **Article 5 Para 1** is too vague. It could include more specific reference to the professional experience of a candidate such as work as a professor of law at a university or as a judge in other jurisdictions. Para 3 of the same article refers to such experience but in very general terms.

11. **Article 6 Para 2** states that "*The judge of the Constitutional Court who has been elected in place of the judge relieved of his/her office before the expiry of his/her term of office shall enter his office at the time determined by the House of Representatives of the Croatian National Parliament*". This provision might be problematic because it gives an opportunity to the Parliament to postpone indefinitely the nomination of a new judge.

12. **Article 10**, while determining the reasons for the termination of office of the judge in its first paragraph, gives additional reasons for removal of the judge in the second one. It would be more logical if the first paragraph would set out the cases when a judge can be removed and the second one the internal discipline of the Court. Sanctions other than revocation could also be included in this paragraph.

13. **Article 11** at **Paras 3 and 4** on the Court's power to determine the *permanent incapacity of a judge of the Constitutional Court* or of its President to carry on their duties could be more detailed. It should be considered whether the quorum for the removal of a judge should be the same as for the removal of the President by the virtue of the principle *par inter pares*.

14. The procedure to follow when the term of office of a judge expires is not sufficiently clear from the wording of **Article 13 Para 1**. This article should be more explicit on the consequences of the expiry of the term of office of the judge on the pending cases or issues she/he is examining. Another issue of great importance, as has already been mentioned in paragraph 10 of this report, is the procedure of election of a new judge by the Parliament. There should be either a procedure allowing the incumbent judge to pursue his/her work until the formal nomination of his/her successor or a provision specifying that a procedure of nomination of a new judge could start some time before the expiration of the mandate of the incumbent one[3].

B. *Review of the constitutionality of laws and the constitutionality and legality of other regulations (Articles 34 – 58).*

15. **Articles 47** and **48 Para 3** do not allow a clear distinction to be made between a public hearing and a consultative session. A public hearing should take place whenever the case before the Constitutional Court is determinant for an

[3] For more detailed description of possible solutions see individual opinion of Mr P. Vandernoot pages 13 – 14 (doc CDL (2000) 96.

individuals civil rights and obligations, within the meaning of Article 6 of the European Convention on Human Rights.

16. **Article 52** allows the Court to "*review the constitutionality of the law"* or "*the constitutionality and legality of other regulations even in the case when the same law or regulation has already been reviewed by the Constitutional Court*". This procedure allows the Court to examine several different cases, complaints or arguments concerning the same law or regulation. However, this provision could be problematic in the light of the principle *res judicata.*

17. **Article 43** authorising the Court to suspend the execution of acts adopted on the basis of law or regulation contested before the Court could be completed and include:
    - as a motive for such suspension, the existence of sufficiently justified reason;
    - as another motive - the adoption of an act identical to the contested one;
    - an authorisation to suspend the law or regulation and not only acts based on them.

18. **Article 55** concerning an incidence of abrogation or amendment of the law or regulation challenged before the Court should be interpreted in a way that allows the Court to take into account when deciding whether to pursue or end the proceedings, the existence of a genuine interest of any injured party in having the case decided by the Court.

19. **Articles 53 – 56** are not clear about the effect of the decisions of the Court. It is not clear when the Court "abrogates", "repeals" or "annuls" unconstitutional norms. Therefore, it is not clear if the effects of its decisions are "*ex tunc*" or "*ex nunc*". A possible solution could be to fix the effects of decisions of the Constitutional Court as "*ex tunc"* and to foresee a possible exception allowing under certain specific circumstances to maintain temporarily the effects of the annulled act[4].

D. *Protection of Constitutional freedoms and human rights (Articles 59 – 76).*

20. It has been already mentioned in Chapter II paragraph 7 of this report that the text of the Law could be more explicit on the role of the Constitutional Court in implementing the international norms of protection of human rights.

21. Another important point can be mentioned in respect of **Article 75** establishing that '*the proceedings instituted by the constitutional complaint shall end when the applicant dies*'. This provision is too strict. In certain cases, especially civil ones, third persons could have a legitimate interest in pursuing the case for example successors.

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[4] See doc CDL (2000) 96 pages 18-19, Paras 48 – 49.

IV Conclusions

22. The Constitutional law on the Constitutional Court of the Republic of Croatia as a whole does not present any major problems in the light of generally accepted principles and rules in European democratic States that aim to safeguard the supremacy of the Constitution, and the independence and impartiality of the Constitutional Court. Nevertheless, some amendments could be made to the text in order to clarify some of its provisions, which can be summarised as follows:

a) there should be a better description of the competences of the Constitutional Court and the role of other jurisdictions in the process of control of constitutionality;

b) the effects of decisions of the Court should be defined in a more precise way;

c) a reference to the role of the Constitutional Court's role in controlling the respect of international instruments of protection of human rights by Croatia should be explicit in the text;

d) the nomination of judges and internal organisation of the Court should be clarified; it would be advisable if the Law includes some provisions for internal discipline.