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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

Draft Opinion on the Amendments of 9 November 2000 and 28 March 2001 to the Constitution of Croatia

on the basis of the comments of Mr Franz MATSCHER (Member, Austria) Mr Sergio BARTOLE (Membrer, Italy) and Mr Alain DELCAMP (Expert, France)

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Introduction

By note dated 9 October 2000 the Secretary General of the Parliamentary Assembly of the Council of Europe informed the Venice Commission of the wish of the Assembly's Monitoring Committee, in the framework of its post-monitoring dialogue with the Croatian authorities, that the Venice Commission follow constitutional developments in Croatia as a whole, in particular concerning the revision of the Constitution, the reform of the electoral law and the reform of the law on local self-government. The present opinion thus concerns the first arm of this follow-up.

On 9 November 2000, the Croatian parliament adopted a wide-ranging series of amendments to the Constitution, aimed at laying the foundations for a transition from a semi-presidential system to a parliamentary model. This was to be achieved primarily through a redistribution of powers between the President and the Prime Minister, accompanied by a reduction in the powers shared between them, and through the reinforcement of the democratic structure of various institutions of Croatia.

These amendments were followed on 28 March 2001 by a further series of amendments which substantially modified the first series.

The present opinion, adopted by the Commission at its 47th Plenary Meeting held in Venice on 6-7 July 2001, summarises the comments made by the Venice Commission rapporteurs (Messrs Franz Matscher, Sergio Bartole and Alain Delcamp) with regard to the two series of amendments.

1 Human Rights

Some very positive amendments have been made to bring the Constitution into line with the European Convention on Human Rights (ECHR). The insertion of Article 16, para. 2, with its requirement of proportionality wherever there is a restriction of a fundamental right, is particularly welcome, as are the amendments to Articles 29 and 31 which bring constitutional guarantees for a fair trial within a reasonable time by an independent and impartial tribunal into line with Article 6 of the ECHR.

The question of entitlement to rights – which, in general, in accordance with international standards, should be guaranteed to everyone within the jurisdiction of the State and not only its citizens – has been dealt with more clearly since the March 2001 amendments. In many cases (right of public assembly and peaceful protest, freedom of association, right of petition and complaint, rights to health care and to assistance for the weak) the original "citizens" has been replaced with the word "everyone", and the phrase "in accordance with the law" has been added. This is a significant improvement, particularly when read in combination with the proportionality requirement mentioned above (should the law introduce different treatment of different people, this difference must be proportional to the aim sought to be achieved). By the same token, certain rights and obligations (in particular obligations with respect to national service) have been clearly limited to citizens of Croatia. There may be some problems with respect to Article 44 of the Constitution, which, in its current form (after the March 2001 amendments) limits the right to take part in the conduct of public affairs and of access to the public services to citizens.[1] Provided, however, that this provision is not

[1] The Commission understands the term "public services" used in the English translation to mean "the civil service".

interpreted as barring non-citizens from holding lower-level posts attached to the civil service, it would not conflict with international standards. It would seem that the right to vote is now, following the March 2001 amendments, limited to citizens; however, it may be noted in this respect that many states grant the right to vote for bodies of local self-government also to non-citizens.

In addition, the provisions with respect to political parties (Article 6 of the Constitution) have been revised, requiring their internal organisation to be in accordance with the fundamental constitutional democratic principles and the origin of their resources and properties to be publicly declared. However, the new fourth paragraph of the Article is problematic, as even a party whose programme is "inclined towards the disruption of the free democratic system or … endangering the existence of the Republic of Croatia" (and not only parties that advocate violent activity aimed at the implementation of rebellious thoughts) could be declared unconstitutional. This may conflict with the freedom of thought and of expression of thought guaranteed under Article 38 of the Constitution. This concern is embodied in the Commission's Guidelines on Prohibition of Political Parties and Analogous Measures (document CDL-INF (2000) 1, § 3).

2 Aspects Specifically Related to the Treatment of National Minorities

The protection of the rights of national minorities is to be regulated by a constitutional law which is being examined by the Commission separately. However, some aspects related to the treatment of national minorities must be mentioned here.

There remains the problem that a list of national minorities is still contained in the preamble to the Constitution. This runs contrary to the practice generally advised by both the Council of Europe and the OSCE High Commission on National Minorities, as it tends to create legal problems related to the protection of rights of minorities (in particular, those that may exist in fact but do not appear on the list) that far outweigh the political benefits gained from the recognition of specific minority groups (which may be better accomplished at the moment when minorities seek to claim the exercise of a specific right).

Furthermore, most of the rights guaranteed in the draft constitutional Law shall be exercised in accordance with specific implementing laws. The importance of the hierarchy of norms and the "constitutional" nature of the Law must be stressed in this respect. The amendments to the Constitution provide that the laws on the rights of minorities shall be "organic laws" requiring a special majority in Parliament for their adoption. The new (constitutional) law should thus be understood to take precedence over implementing laws, which may be examined by the Constitutional Court for their conformity with the new Law. However, it remains to be seen how the new Article 83 of the Constitution, which provides that the "laws (organic laws) regulating the rights of national minorities shall be adopted by a two thirds majority of votes of all representatives" will work in practice. If it is interpreted to mean that even implementing laws must be regarded as organic laws, this will not only make their adoption extremely cumbersome but may also compromise the constitutional review process mentioned above, as implementing laws will have the same force as the new Law.

3 The Reform of Central Powers

One of the many positive aspects of the November 2000 amendments is that they substantially modify the distribution of powers between the President and the Prime Minister, moving clearly away from the former semi-presidential regime and towards a greater

parliamentary control over the executive. In practice, this means that the President's powers have been reduced, sometimes in favour of the Prime Minister or government, and sometimes in favour of the parliament. Indeed the reforms go so far as to remove any reference to the President as head of state, although he will continue to exercise the function of representing and acting on behalf of the Republic at home and abroad. The President must also resign from any political party of which he may be a member, meaning his role has become more neutral. Finally, he is prohibited from holding office more than twice. The tendency is thus to prevent any abuse of presidential power.

With regard to specific powers, the changes are sweeping and only a selection are outlined here. The President's discretion in the formation of the government has been significantly reduced in favour of the parliament; he no longer presides over the meetings of the government, although he may attend and participate in them; he is obliged to cooperate with the government on matters such as foreign policy and security services, and must even consult the relevant parliamentary committee for the appointment of heads of diplomatic missions abroad; the countersignature of the Prime Minister is required for the use of armed forces although a state of war has not been proclaimed, where there is "immediate danger to the independence, unity and existence of the state" (Article 100 as amended, which continues to require the approval of the parliament for a declaration of a state of war or peace); the President retains the right to dissolve the House of Representatives, but on the basis of a proposal by the government and within clearly defined conditions.

The net result of these amendments is a substantial transfer of powers from the President to the Prime Minister, within a circle of executive competences that has been reduced overall to the benefit of the legislature. These are to be welcomed as a clear departure from a system that allowed for the authoritarian exercise of presidential power and as a movement towards a parliamentary system. However, a note of caution must be voiced in this respect, as the amendments may mean that, in the context of virtual "co-habitation" between the various powers, it is not possible to guarantee the stability of government. In particular, the provisions regulating votes of confidence or no confidence in the government (Article 113 as amended) may give rise to long periods of governmental inactivity.

4 Reform of the Legislature

A symbolic break from the past can be noted in the change of the name "Croatian State Parliament", as this body was known following World War II, to "Croatian Parliament".

The constitutional amendments introduced in November 2000 modified to some extent the composition of the House of Counties, which previously allowed for former Presidents to be life-long members and also provided for up to five members to be nominated by the President but is now to be composed only of representatives elected from the Counties. This House could be seen essentially as a guardian of fundamental rights and the rights of local and regional self-government, with a right to participate through debates and opinions in a wide range of decisions of the parliament. The drafting with regard to the House of Counties was especially sophisticated with respect to the protection of fundamental freedoms, the rights of minorities and the principles of local self-government. It passed decisions on an equal footing with the House of Representatives on a series of matters, in particular in the adoption of "the laws which elaborate constitutionally determined freedoms and rights of man and citizen" (Article 81 as amended to November 2000) – a role which may be especially important in relation to minority rights.

However, this upper house of parliament was abolished by the amendments adopted in March 2001. It may be regretted that the Constitution was revised twice in a very short space of time, with the result that full advantage could not be taken of the possibilities that the House of Counties could have offered after the first revision of the Constitution, in terms of the representation of new local and regional authorities but also of new self-governing bodies for minorities that are in the process of creation under the new law on the rights of minorities. It may also be noted that the House of Counties was abolished just before the organisation of local elections and at a time when the constitutional law of minorities had not yet been adopted. Although there is no element in the European constitutional heritage that requires the existence of an upper house of the legislature, it would be regrettable if the unicameralism instituted by the March 2001 amendments were to make future constitutional revision too easy and weaken constitutional stability.

5 Judiciary

A number of positive aspects relating to the judiciary were noted in the November 2000 amendments. These include measures that seem clearly designed to reinforce the independence of the judiciary by introducing new procedures for the nomination of the president of the Supreme Court and the State Judicial Council, although greater weight could have been given to the Supreme Court's opinion as to the election of its President and to ensuring the participation of the parliamentary minority in the choice of members of the State Judicial Council by requiring a special majority vote on such matters.

However, Article 70 of the March 2001 amendments, inserting a new Article 146a into the final provisions of the Constitution, has the immediate effect not only of bringing to an end the functions of the House of Counties but also of removing from office the incumbent president and members of the State Judicial Council and the president of the Supreme Court. Although the aim appears to be to ensure that all these members of the judicial branch of power will, from now on, be persons who have been appointed through procedures designed to ensure their independence from the other branches of power, the instant removal of persons currently holding office, which results from this provision – rather than a simple application of the new provisions to the replacement of incumbents when their term of office comes to its normal end – may set a disturbing precedent, and gives rise to serious concerns regarding the rule of law in Croatia in future.

The Commission also notes that some provisions of the Judiciary Act relating to the election of presidents of courts seem somewhat vague, notably regarding the powers of the Minister of Justice and the role of the judicial councils in this process. Finally, the Commission notes that these provisions are the subject of an application currently pending before the Constitutional Court of Croatia.

6 Local Self-Government

The importance of local and regional authorities is underlined in the amended Constitution by the new formulation of Article 4, which affirms the principle of the separation of powers and states that these powers "shall be limited by the constitutionally guaranteed right to local and regional self-government", laid down in the amended Article 128. The amended Constitution introduces a new level of power at the regional level as well as provisions necessarily defining the respective powers of the local and regional levels. These provisions closely follow those of the European Charter of Local Self-Government with respect to the principle of subsidiarity. Similarly, several other provisions of the Charter are closely followed in the

amended Articles, such as those governing the organisation of local self-government bodies, the absence of all supervision except with respect to constitutionality and legality where local self-government bodies are exercising their independent (non-delegated) powers, and provisions governing finances. This development is to be welcomed, although two further observations must be made: first, the resources necessary to exercise these powers must be transferred to the appropriate levels, and second, a new law on local self-government must be adopted in line with the new constitutional scheme. The adoption of this new law on local self-government having been delayed until the end of 2002 by the law governing the entry in to force of the new constitutional provisions, it is to be regretted that the local elections that were held before this date took place in accordance with laws of which the conformity with the Charter may be questionable.

Conclusions

Generally speaking, the Commission welcomes the amendments to the Constitution and in particular the transition towards a parliamentary system.

This transition is accompanied by a series of other highly opportune amendments in the fields of human rights, local and regional autonomy and the judiciary. The clarification in the March 2001 series of amendments of the persons entitled to rights is also a welcome development.

Some observations may be made as to problems that may arise in implementing certain provisions:

- the provision governing the right of access to the civil service should not be interpreted as preventing non-citizens from holding lower-level posts attached to the civil service; likewise, the right to vote in local self-government elections could be extended to non-citizens;

- the abolition of the House of Counties by the March 2001 amendments removes one possibility of participation by local and regional authorities in decisions adopted at the level of the state, but also removes a possibility of participation by new self-governing bodies for minorities being created in the framework of the new law on the rights of minorities; it must be ensured that in future the abolition of the House of Counties does not make further constitutional amendments too easy and does not contribute to a weakening of constitutional stability;

- the new system of local and regional authorities, which the Commission welcomes, must be accompanied by the transfer of resources to the appropriate levels and by the adoption of a law in line with the constitutional amendments;

- in line with the constitutionally guaranteed freedom of thought and of expression of thought, and with the Commission's Guidelines on the Prohibition of Political Parties and Analogous Measures, the possibility of declaring a political party unconstitutional must be limited to those parties that advocate violent activity aimed at the implementation of rebellious thoughts;

- the hierarchy of laws with respect to minorities is not clear and the special majority required for the adoption of laws on minorities may on the one hand be too cumbersome if it is also applied to implementing laws and on the other pose problems as to the

Constitutional Court's competence to assess the constitutionality and legality of implementing laws in this field;

- the generally positive developments with respect to the judiciary contained in the first series of amendments may be marred by the implementing provisions contained in the second series, which remove the President of the Supreme Court and all members of the State Judicial Council from office as from the moment on which the amendments come into effect. These implementing provisions could create a dangerous precedent for the respect of the rule of law in Croatia.