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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

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

prepared by the Secretariat
on the basis of the comments of:

Mr Franz Matscher (Member, Austria)
Ms Hanna Suchocka (Member, Poland)
Mr Pieter van Dijk (Member, The Netherlands) and
Mr Alain Delcamp (Expert, France)

Introduction

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

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

The Venice Commission Rapporteurs, Mr Franz Matsher, Mr Pieter van Dijk and Ms Hanna Suchocka, and Mr Alain Delcamp, Chairman of the Expert Committee of the Congress of Local and Regional Authorities of Europe in charge of the monitoring of the European Charter of Local Self-Government, considered the draft law at a meeting held in Paris, on 1 September 2000 and subsequently on 22 September 2000, in the presence of Ms Lidija Lukina, Vice-Minister of Justice, and Ms Sanja Tabakovic, President of the Council of National Minorities in Croatia. A further meeting of the Venice Commission Rapporteurs was held in Venice, on 13 October 2000.

At its 44th Plenary Meeting (Venice, 13-14 October 2000), the Commission adopted its opinion on the draft constitutional law on the rights of minorities in Croatia (CDL (2000) 79 rev), noting that the draft law was generally positive but highlighting a number of areas where it needed to be clarified.

On 4 and 5 January 2001, the Venice Commission Rapporteurs, Mr Matscher, Ms Suchocka and Mr Delcamp, met in Zagreb with the Croatian Working Group set up under the Chairmanship of the Minister of Justice, Administration and Local Self-Government Mr Ivanisevic, to draft the Constitutional Law[1] on the rights of national minorities in Croatia. Representatives of the Ministry of Foreign Affairs, of the Council of National Minorities and experts from the University of Zagreb took part in this meeting.

The Rapporteurs and the members of the Working Group considered the draft Constitutional Law (CDL (2001) 1) prepared by the Working Group as well as the implications of the Constitutional Revision of 9 November 2000 on the rights of minorities in Croatia. Since this meeting a further series of amendments to the Constitution was adopted on 9 March 2001 and a new draft of the law on the rights of national minorities has been prepared (document CDL (2001) 29). It is this draft that is the object of the present opinion, adopted by the Commission at its 47th Plenary Meeting (Venice, 6-7 July 2001).

[1] With regard to the meaning of the term "Constitutional Law" in the Croatian constitutional order, see below, point 5.

1. General Comment

The Commission is of the opinion that the new draft law (see document CDL (2001) 29) constitutes an important step forwards in the protection of national minorities in Croatia. It provides a comprehensive and coherent framework for further legislative and regulatory action in the field of minorities' protection. Several problems identified by the Commission in earlier drafts (see document CDL (2000) 79 rev) have been eliminated. However, various improvements might still be made to the draft and these are discussed below.

2. Effects of the Entry into Force of the New Constitutional Law

The Commission notes with satisfaction that Article 39 of the new draft clarifies the situation as to the validity of various instruments guaranteeing rights of persons belonging to minorities at the level of the Constitution. It is now clear from this provision that the Constitutional Law of 1991, as amended in 2000, shall cease to be valid on the date of promulgation of the new Law. (Article 37 still provides that rights acquired before the date of the entry into force of the new Law are not restricted or amended by the latter. The Commission understands that this provision does not concern rights "acquired" under the regime of the Constitutional Law of 1991.)

3. List of Minorities

The Commission welcomes the abolition of the list of minorities in the new Law. It notes, however, that a list of minorities is still valid in the Preamble of the Constitution. As the Commission had occasion to remark in its opinion on the amendments of 9 November 2000 and 28 March 2001 to the Constitution of Croatia (see document CDL (2001) 69):

> [t]his 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.

4. Definition of Minorities

Under the draft Law as well as in the list of minorities that continues to exist in the Preamble to the Constitution, the notion of minorities is restricted to citizens of Croatia. Such a restriction departs, however, from recent tendencies of minority protection in international law (Article 27 of the International Covenant on Civil and Political Rights and practice of the OSCE High Commissioner on National Minorities). Furthermore, except in the case of political representation at levels other than the local level, citizenship is generally irrelevant to the content of internationally prescribed minority rights.

The Commission understands that the definition in Article 1 of the draft Law does not purport to be a general definition of "national minorities" but aims at defining the persons who have the specific "constitutional" rights enshrined in the new Constitutional Law. Consequently, this does not prevent the Croatian legislator from granting persons belonging to minorities who are not (or not yet) citizens of Croatia the rights they are entitled to under international law and in accordance with the Constitution of Croatia. The Commission would favour nevertheless the inclusion of an explicit provision to this end in the draft law.

In this context the Commission notes with satisfaction that following the March 2001 amendments to the Constitution of Croatia, individuals' entitlement to constitutional rights has been dealt with more clearly, and in many cases (e.g. the right of assembly; the right to freedom of association; the right to petition) now clearly includes all persons. However, some of the rights enshrined in the Constitution are also now clearly restricted to citizens: in particular, the right to take part in the conduct of public affairs and to have access to the public service, as well as the right to vote. This may generate some problems for the effective enjoyment of these rights by persons belonging to minorities who are not, or not yet, citizens of Croatia. As the Commission stated in its opinion on the Amendments of 9 November 2000 and 28 March 2001 to the Constitution of Croatia (document CDL (2001) 69):

> 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.[2] Provided, however, that this provision is not 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.

5. Implementing Laws and Hierarchy of Norms

Most of the rights guaranteed in the draft Law shall be exercised in accordance with specific implementing laws. The Commission understands that these implementing laws must be compatible with the general provisions in the Constitutional Law. Restrictions of the rights enshrined in the new Constitutional Law should be only for legitimate purposes (also in respect of international law) and proportionate to the aim pursued. They should not affect, in any case whatsoever, the very essence of the rights guaranteed. Furthermore, it must be understood that the compatibility of special implementing laws with the Constitutional Law must be subject to review by the Constitutional Court.

The Commission stresses in this respect the importance of the hierarchy of norms and the "constitutional" nature of the Law. Although the draft Law is termed a "Constitutional" Law, it is understood that as a result of the amendment of Article 83 of the Constitution and of decision U-I-774/2000 of 20 December 2000 of the Constitutional Court (which found that the Constitution does not provide for any Constitutional Law other than the one on the Constitutional Court) the Law on the Rights of Minorities will be an "organic" Law. The Constitutional Court found in the same decision (U-I-774/2000) that an organic law "is a law which is below the Constitution, but above other laws, and its stronger force stems from the special majority by which it is passed". It is the Commission's understanding that the new Law will thus take precedence over implementing laws and that, consequently, the Constitutional Court of Croatia – which is entrusted with the task of reviewing not only constitutionality *stricto sensu* but also legality in general – will be able to review the compatibility of implementing laws with the new Law.

It remains however to be seen how the new provisions of Article 83, paragraph 1 of the Constitution will be put into practice. This provision reads: "Laws (organic laws) regulating the rights of national minorities shall be passed by the Croatian Parliament by a two-thirds majority vote of all representatives". The question can be raised whether all implementing laws should therefore be regarded as "organic" laws in the sense of Article 83 of the

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

Constitution. Such an interpretation would not only make the adoption of implementing laws extremely cumbersome but might also compromise the constitutional review process, as implementing laws would have the same legal force as the new organic Law. In order to ensure the effective protection of the rights of minorities, the Commission therefore recommends that Article 83 of the Constitution be interpreted restrictively, as having no application to implementing laws.

6. Electoral Rights

The draft Law clearly provides for a "plural" (double) vote system for citizens belonging to minorities. It is expressly stated that "members of national minorities shall have, along with the general and equal right to vote for members of the House of Representatives of the Croatian Parliament, the right to elect a certain number of members of Parliament in accordance with a special Law" (Article 18 of the draft).

As to the substance, the Commission agrees with the idea of letting the legislator define the specific number of minorities' representatives in the Croatian Parliament, as the principles for such representation are laid down in Article 20 of the draft, i.e.: at least 6 members of the Croatian Parliament for minorities forming less than 4% of the population, in accordance with the Elections of Members of the Croatian Parliament Act.

For minorities forming more than 4% of the population, it is specifically provided (Article 19, paragraph 1) that they "shall have the right to representation in the bodies of state authorities in proportion to their share in the population". This, when read in conjunction with paragraph 2 of this Article and with Article 18, seems quite clearly to include representation in the Croatian Parliament. It is not clear, however, to which bodies other than the Croatian Parliament the provisions of Article 19 are intended to apply, and in particular whether and to what extent they also apply to executive and judicial bodies at the level of the state. The draft law refers to the law on the organisation of state authorities as the text regulating this proportional representation; but it may be advisable for the scope of Article 19 to be further clarified in the present draft.

Article 21 deals with similar questions, but with respect to local and regional bodies rather than state authorities. The reference here to proportional representation in executive bodies is new and presents some problems in so far as mention is made of the right to "*elect* a certain number of members of…*executive* bodies of local and regional self-government" (emphasis added).

7. Council of National Minorities and Office for National Minorities

The Commission notes with approval that it is now clearly stated in the explanatory report that the special advisory body provided for in Article 34 of the draft Law is the continuation or successor of the present Council of National Minorities. Furthermore, the explanatory report states that the expert body provided for in Article 35 of the draft Law is the continuation or successor of the present Office for National Minorities. Both of these bodies thus now have a clear basis in law.

8. Minority Self-Government

The question of the so-called "minority self-government"[3] is a significant aspect of the draft Law. The new draft provides in a much more detailed manner for a system of "personal autonomy", inspired by the Hungarian model but with some territorial aspects as well. The Commission considers that the system the draft aims at establishing provides, in general, a viable and adequate substitute for the abolished special status regime provided for in the Constitutional Law of 1991 and never implemented.

It should be stressed in particular that the new text (Articles 22-29) is a substantial improvement in comparison with the draft forwarded to the Commission in July 2000, on which its initial opinion was based (see, respectively, documents CDL (2000) 62 and 79 rev). The new Articles should be read in conjunction with relevant provisions in the Constitution as amended, granting local self-government units an important part of decision making power in local affairs. The Commission notes with approval that under Article 26 minority self-government units have legal personality and can thus address the courts, including the Constitutional Court. In addition, minority self-government units have the power under Article 27 to decide independently issues concerning the use of their national signs and symbols as well as local holidays. These competences are, however, minimal, and competence in other areas such as religion and education could be added to this list. Other competences may also be assigned to the minority self-government units, in accordance with the draft Law, by virtue of the Law on Local Self-Government. However, it is to be noted that the latter Law has now been passed and such competences could not yet be granted in it owing to the non-adoption to date of the Law on the Rights of National Minorities.

On issues such as proposing constituencies, passing development plans, plans for the protection of the environment or other issues of special interest for national minorities, according to an earlier draft (document CDL (2001) 1), local and regional self-government bodies were obliged to consult the minority self-government and, if they did not follow the opinion of the minority self-government, to give the reasons in writing. These provisions have disappeared from the current draft. While the requirement to give reasons in writing may have been somewhat heavy, it is to be regretted that some consultation process in such matters is no longer expressly provided for. A right still exists under Article 28, paragraph 1, sub-paragraph 5 for minority self-governments or representatives to receive a written answer to their proposals and requests within 30 days; however, this places the initiative on the minority body to make a proposal or request when such issues arise rather than requiring other bodies to consult them.

Other provisions expressly providing for the right of minority self-governments to petition the President, Prime Minister or President of the Parliament in relation to issues especially important to them; allowing for them to maintain contacts and sign co-operation agreements with minority associations and to co-operate with self-government bodies of other national minorities; providing for national-level minority self-government bodies to establish their own rules in accordance with certain requirements laid down in the draft Law; and providing that a national-level minority self-government has the same competences as a minority local self-government, have also been removed from the current draft. The Commission fails to see why these provisions, which could successfully have addressed the issue of minorities' cultural autonomy at regional and state level and could become a significant means for promoting minorities' rights, have been removed from the draft.

[3] The term "Minority Self-Rule" has also been suggested. The term "autonomy" could be more accurate.

Several points could be further clarified in the draft, in particular:

- the manner in which a member of a local self-government body is denoted as having been elected "by one national minority" (Article 23 para.1);
- the consequences that may arise in the theoretically possible event that there may be two minorities having the requisite 20% of members of a local or regional self-government body in order to be entitled to establish a "minority self-government" (Article 23 para. 2);
- the prerogatives of the "minority representative" referred to in Article 23 para. 3;
- the possibility – or even necessity – for State financial support for the budget of local and regional minority self-government units;
- the question of legal personality of minority self-government units at the level of the communes (*mjesna*);
- the purpose of the register of minority self-government to be kept in accordance with Article 29 and the information to be kept in it.

9. Miscellaneous Provisions

Article 11, paragraph 2 places an obligation on fully or partially state-owned media bodies to publish or broadcast information and data related to discrimination against a national minority or a member of a national minority. It is not clear that this provision will result in a diminishing of the number of cases where such discrimination occurs and the Commission considers that such a provision may be better omitted from the Law.

A distinction is made in Article 13, paragraph 1 between associations formed on the one hand for the purpose of the protection and promotion of national minorities' ethnic, linguistic and/or religious characteristics and on the other hand for the preservation (but not the protection or promotion) of their own culture, tradition, language and/or religion. This distinction seems unnecessary and the paragraph might be more simply drafted if the terms "cultural" and "traditional" were included in the first list (of characteristics) and the second list were removed.

While the intention stated in the explanatory report of ensuring that minority associations have a certain political significance is laudable, the role that may be played by the representatives they nominate to the Croatian Parliament under Article 13, paragraph 3 of the draft is unclear and, given the provisions already made for the representation of national minorities at state and local level under Articles 17 to 21 of the draft, the presence in these bodies of further representatives of minority associations may constitute an unnecessary complication in the functioning of the Parliament.

Finally, reference is made on several occasions to the House of Representatives. Following the abolition of the House of Counties under the March 2001 amendments to the Constitution, these references in the law should systematically be replaced with a reference to the Croatian Parliament.

10. Conclusions

The Commission wishes to thank the Minister of Justice and the members of the Working Group for the spirit of genuine openness and co-operation which has prevailed during work on the draft Law on the Rights of National Minorities.

It finds that the new draft significantly improves the legal framework of minority protection in Croatia. It clarifies most of the inconsistencies of previous drafts, in particular as regards the effects of the new law and the electoral rights aspects, and provides for the establishment of a

system for minority self-government at local, regional and state level that can be regarded as an adequate response to the needs of minorities in Croatia.

Attention must nevertheless be drawn to certain aspects of the draft Law:

- while welcoming the removal of the list of minorities from the Law, the Commission notes that such a list continues to exist in the Constitution;

- laws implementing this "Constitutional" Law must not be treated as organic laws under Article 83 of the Constitution but as ordinary laws of which the conformity with the Law on the Rights of National Minorities is subject to review by the Constitutional Court;

- some ambiguities with respect to the provisions on minority self-government, in particular as regards their functioning, should be removed while, at the same time, some necessary clarifications as to their competencies should be made.

The Commission notes that more than one year after the abolition of the suspended provisions of the Constitutional Law of 1991 in May 2000, no normative action has been successfully carried out by the Croatian Parliament at supra-legislative level to replace the abolished provisions. The protection of minorities' rights at the level of the Constitution therefore remains incomplete.

The Commission remains at the disposal of the Croatian authorities for further co-operation in the field of this draft law.