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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS ON THE PROPOSAL FOR THE CONSTITUTIONAL LAW ON THE RIGHTS OF NATIONAL MINORITIES (17 JULY 2002) OF CROATIA

by

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DRAFT CONSTITUTIONAL LAW
ON THE RIGHTS OF NATIONAL MINORITIES OF CROATIA
(17 July 2002)

Comments by Pieter van Dijk

In making the following comments I follow the structure of the opinion, adopted by the Venice Commission on 6-7 July 2001 (CDL-INF (2001) 14)

1. General Comment

These comments relate to the version of the draft Constitutional Law of 17 July 2002. It may be that the text of the Bill, as it will be submitted to Parliament, differs in some respects from the text commented upon.

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

According to article 41 of the draft, the effect of the entry into force of the present Constitutional Law will be that the 1991 Constitutional Law on Human Rights and Freedoms and the Rights of Ethnic and National Communities or Minorities in the Republic of Croatia, as amended, will cease to be valid. This clarifies the relation between the two laws. It is correct that the draft, in its English translation, now speaks of "coming into effect' rather than of "promulgation".

Article 38 of the present draft makes it clear that it is not intended to be a provision of a transitional character. The protection of "acquired rights" does not include rights acquired under the 1991 Constitutional Law or any other domestic legislation replaced by the new Law, but is expressly restricted to the rights of national minorities acquired on the basis of international treaties to which Croatia is a party. In fact, this boils down to a recognition, in this respect, of the priority of international law over domestic law. However, from the end of the first paragraph of Article 2 of the draft it ensues, that the Constitutional Law is not intended to replace all previous regulations concerning minority rights; it leaves room for special laws to remain in force and for the adoption of future special laws. This raises the issue of the relation between the provisions of this Constitutional Law and the provisions of previous and later laws concerning the same issues (see also comment 5).

The last words of the fourth paragraph of Article 2, *viz.* "on their acquired rights and on the international agreement", make the picture again less clear. They suggest a distinction between "acquired rights" and "international agreements". They also seem to imply that the Constitutional Law may qualify the exercise of rights to which members of national minorities are entitled under international agreements, by making that exercise dependent on their numerical representation in the Republic of Croatia. However, whether and to what extent such qualification is possible at all, depends on the wording and purpose of the treaty provision concerned.

3. List of Minorities

It is to be welcomed that the new draft has deleted from Article 3 the second paragraph of an earlier draft, which again introduced a restrictively formulated list of minorities.

4. Definition of Minorities

Article 3 of the draft contains a general definition of "national minority", which is restricted to “Croatian citizens”. Accordingly, Article 2 of the draft restricts the right to express oneself freely on whether one is a member of a national minority, and the right to exercise minority rights and freedoms to "citizen[s] of the Republic of Croatia". It also means that the prohibition of discrimination, and quarantee of equal treatment, laid down in the second paragraph of Article 2 and which are intended to reflect Article 4 of the Framework Convention, relate to Croatian citizens only.

It should be repeated that such a restriction departs from recent tendencies of minority protection under international law, as appears, *inter alia*, from the interpretation given by the Human Rights Committee to Article 27 of the International Covenant on Civil and Political Rights, and from the interpretation by the OSCE High Commissioner on National Minorities to his mandate. It should, again, be stressed that, for the enjoyment of minority rights, citizenship is generally considered to be relevant only in the case of certain political rights. As far as political representation is concerned, there is the tendency in Europe to extend the right to vote and be elected to non-citizens at local levels, provided that they have been lawful residents of the area concerned for a certain period of time.

It is to be preferred that the restriction to "citizens" be deleted from Article 3 and qualified in Article 2 in the sense that the restriction applies to certain minority rights of a political character only. In any case, Article 3 should expressly state that the definition contained therein is a definition for the purposes of the present Constitutional Law only, and is not meant to give a definition for Croatian law in general. Moreover, in an explanation concerning Articles 2 and 3 it should be clarified that the restriction to "Croatian citizens" is not intended to, and cannot, restrict the definition of "national minority" in a general way with application to the enjoyment of those rights under the Constitution, under other domestic regulations and under international law, in relation to which no requirement of citizenship has been made and to which everybody is entitled on an equal basis.

The words "whose members have been traditionally settled in the territory of the Republic of Croatia" have been added as part of the definition. Since these words may imply an important restriction of the definition, they should be clarified in the explanation concerning Article 3.

The comment made in the previous opinion of the Venice Commission concerning the limitation to citizens of certain of the rights contained in the Constitution, could be repeated here.

5. Implementing Laws and Hierarchy of Norms

The comments made and questions raised in the previous opinion still apply. The status of the Constitutional Law as an "organic law" is affirmed in the explanation concerning Article 40 of the draft. In the draft there are several references to "special laws" which will regulate certain of the rights and freedoms of minorities guaranteed in the Constitutional Law. The status of these "special laws" and their hierarchy in relation to the proposed Constitutional Law is of importance, *inter alia,* in view of the power of the Constitutional Court to review their conformity with not only the Constitution but also this Constitutional Law.

6. Electoral Rights

The main difference between the two alternatives of Article 18 would seem to be that the first alternative presents a system where universal suffrage is, from the beginning, combined with the additional election of minority representatives, whereas the second alternative starts from universal suffrage, with additional elections of minority representatives only if the outcome of universal suffrage has not led to the election of the required minimum number of minority representatives. The advantage of the first alternative is that a fixed portion of the total number of seats of Parliament will be reserved for the additional elections. This portion may be reduced from the total number of seats. The second option would seem to leave open whether and, if so, how many seats will have to be added to the total of seats elected by universal suffrage.

A complication, presented by both alternatives, is that the number of seats reserved for a specific national minority will be determined by the number of times the total number of voters is contained in the number of members of that national minority who participated in the elections. This means that the number of seats to be reserved for representatives of national minorities cannot definitively be fixed beforehand. The problem is even more serious under the system of the second alternative. There it remains completely uncertain until the elections on the basis of universal suffrage have taken place, whether and for how many seats additional elections will have to be held. Especially the latter system would seem to imply that the number of seats of Parliament might have to be extended depending on the outcome of the elections, which could result in a violation of the Constitutional provision fixing the number of seats.

Article 19 of the draft, which concerns local and regional self-government bodies, takes the possible necessity of an increase into account by allowing for such an increase of the number of members determined in the statute of the body concerned. Article 18, on the contrary, is silent on the issue.

Both Article 18 and Article 19 imply that the voter will have to reveal, at the moment of voting, whether he or she belongs to a national minority. This may create difficulties for those who justifiably fear certain repercussions. The same observation holds good for the census provided in Article 21 of the draft. It should be clarified which precautions will be taken to protect the confidentiality of the information provided.

7. Council of National Minorities and Office for National Minorities

It is not clear from the explanation concerning Articles 33 and 34 of the draft, whether and to what extent the Council for National Minorities to be established under Article 32, will be the continuation of the existing Council of National Minorities, and whether and to what extent the Expert Service, to be established under the forth paragraph of Article 33, will be the continuation of the existing Office for National Minorities. While the composition of the Council for National Minorities is regulated in much detail, the composition of the Expert Service is left totally to the Government.

8. Minority Self-Government

Article 20 of the draft provides for proportional representation of national minorities in self-government units. The second paragraph seems to make a connection between representation in state administrative bodies and a special law to be enacted, while the explanation concerning Article 20 suggests that the special law mentioned will deal with proportional representation of national minorities in *judicial* bodies. This issue requires clarification.

Article 22 deals with the establishment of minority self-government in local and regional self-government units. As compared to the powers and rights allocated to minority self-governments under Articles 27 and 28 of the previous draft, the new draft means a depreciation of the institution. The decision-making power on proposals concerning the use of national minority's signs and symbols, and concerning holidays of the national minority concerned is no longer mentioned, nor is the right to receive a written answer to their proposals and requests within 30 days, the right to propose agenda items for the representative bodies concerning minorities, and the right to give consent regarding personnel related decisions concerning institutions relevant for a national minority.

The observations made in the third and forth paragraph of section 8 of the previous opinion of the Venice Commission are also applicable to the present draft, as are most of the questions raised in the last paragraph.

9. Miscellaneous Provisions

Article 14 of the draft speaks only of "preservation of national and cultural identity of a national minority" but not of "promotion", which would have implied a more active approach.

10. Conclusion

The new draft of a Constitutional Law means in some respects a step backwards as compared to the previous draft, although the present version is an improvement as compared to the earlier version. Various concerns expressed and questions raised by the Venice Commission in its consecutive consultations and opinions have been ignored.

In the light of the experience so far one cannot but conclude that the long-term dialogue of the Venice Commission with the Croatian authorities on the drafting of the Constitutional Law still has not led to a satisfactory result in all respects.