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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

On the basis of comments by

Mr Pieter VAN DIJK (Member, The Netherlands)
Mr Franz MATSCHER (Member, Austria)

Introduction

1. *In the course of the last decade, the Venice Commission has been asked on several occasions, to deal with the revision of the constitutional law on the rights of national minorities in Croatia. It has produced opinions on various successive draft laws [see in particular, CDL (1996) 26; CDL-INF (2000) 10 and CDL-INF (2001) 14], none of which was eventually adopted.*
2. *Last summer, meetings between representatives of the Government and the minorities have taken place and have resulted in a new draft of the constitutional law (hereafter: draft constitutional law) being finalized on 15 July 2002. On 17 July 2002, Deputy Prime Minister, Mr. Goran Granic called upon the Venice Commission and the international community for their opinion on the new draft of the constitutional law.*
3. *On 22 July, the Government of Croatia submitted to the Parliament the final version of the draft constitutional law, which is the modified version of the draft of 15 July, to be adopted in an extraordinary session of the Parliament (30-31 July) through an expedited procedure. Certain amendments have been proposed by two Parliamentary Committees: Mato Arlovic's Parliamentary Committee for the Constitution, Political System and Standing Orders, and Furio Radin's Parliamentary Committee for Human Rights and Rights of National Minorities.*
4. *After long discussions and the majority of clubs of deputies' opposition to an expedited procedure, on 30 July the Parliament decided to proceed with the adoption of the draft constitutional law through an ordinary procedure of two readings. On 31 July 2002, the draft constitutional law was supported in the first reading.*
5. *The present opinion, adopted by the Commission at its ... Plenary Meeting (Venice, ... 2002), refers to the latest version of the draft constitutional law, as submitted to the Parliament on 22 July 2002.*

1. General Comment

6. The Commission welcomes the resumption of the procedure for the adoption of a Constitutional law on the rights of national minorities in Croatia. The new draft constitutional law contains in several aspects, improvements and clarifications as compared to the previous drafts, and its provisions could thus contribute towards building a comprehensive framework for the protection of national minorities in Croatia.

7. Nevertheless, various articles call for comments and are discussed below with a view to contributing to improving the draft constitutional law, and bringing it even more in conformity with international standards as well as with the specific needs of persons belonging to national minorities living on the Croatian territory.

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

8. The Commission notes with satisfaction that according to article 42 of the draft constitutional law, 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. The draft, in its English translation, now correctly speaks of "coming into effect" rather than of "promulgation".

9. Article 39 of the present draft, concerning "acquired rights", makes it clear that that provision is not intended to be a provision of a transitional character. The protection of "acquired rights" is restricted to those acquired by virtue of international agreements to which Croatia is a party. It does not cover the rights acquired under the 1991 Constitutional Law or any other domestic legislation replaced by the new Law. As such, this provision codifies the recognition of the precedence of international law over domestic law.

10. However, from the end of the first paragraph of Article 2 of the draft it ensues, that the draft constitutional law is not intended to replace all previous regulations concerning minority rights; it leaves room for the remaining in force of special laws and for the adoption of future special laws. This raises the issue of the relation between the provisions of the draft constitutional law and the provisions of previous and later laws concerning the same matters (see also point 5 below).

11. In that connection, the fourth paragraph of Article 2, which speaks of "in the manner and under the conditions stipulated by this Constitutional Law and special laws", seems to place the special laws on an equal footing with the Constitutional Law, since it does not stipulate that the conditions provided for in the latter control the exercise of the rights and freedoms laid down in the special laws.

12. The fifth paragraph of Article 2, which speaks of "on their acquired rights and on the international agreement", makes the picture of the "acquired rights" again somewhat unclear. It suggests a distinction between "acquired rights" and "international agreements", which raises the question of what "acquired rights" are meant. It also seems 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

13. It is to be welcomed that the draft constitutional law does not contain a limitatively formulated list of minorities, in line with what the Commission recommended in its previous opinion (CDL (2001) 14) and contrary to what was the case in the previous drafts.

4. Definition of Minorities

14. Article 3 of the draft constitutional law contains a general definition of "national minority", which, according to the Explanation concerning Article 3, takes into consideration the "definition" proposed by the Venice Commission.

15. In the definition, the concept of "national minority" is restricted to "Croatian citizens". Accordingly, the first paragraph of 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 the guarantee 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.

16. In this respect, it should be noted that Article 2 of the Commission's proposal for a European Convention for the Protection of Minorities¹, mentions expressly the citizenship among features that characterize a "minority group"; so does the Recommendation of the Parliamentary Assembly 1201 (1993).

17. On the other hand, the Framework Convention for the protection of national minorities remains rather ambiguous in this regard. It could therefore be argued that there are specific minority rights – not only those of a political character –, which may legitimately be reserved to citizens only.

18. Indeed, as the Commission had the occasion to remark in its previous opinion (CDL (2001) 14, p. 4) - 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. Indeed, 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 to 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 (see also the Guidelines on Elections of the Venice Commission, CDL-AD (2002) 13, Principle 1.bb.ii).

19. The Commission understands that the definition of "national minority" given in Article 3 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. The Commission would nevertheless favour the inclusion of an explicit provision in this sense in the draft law if the restriction to "citizens" is maintained. Furthermore, the Explanation concerning Articles 2 and 3 should also clarify that the restriction to "Croatian citizens" is not intended to, and cannot, restrict the definition of "national minority" in a general way in respect of 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.

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

21. As to the limitation to citizens of certain of the rights contained in the Constitution, the Commission refers to its comments pointed out in its previous opinion.

¹ Science and technique of democracy, n°9 "*The protection of minorities*", The European Commission for Democracy through Law, Council of Europe, 1994.

5. Implementing Laws and Hierarchy of Norms

22. The status of the Constitutional Law as an "organic law" is stated in the Explanation concerning Article 43 of the draft constitutional law. In the draft constitutional law there are also several references to "special laws" in the which will regulate certain of the rights and freedoms of minorities guaranteed in the Constitutional Law.

The Commission stresses in this respect that the status of these "special laws" and their hierarchy in relation to the proposed Constitutional Law is of importance, *inter alia* in relation to the question of whether the Constitutional Court has jurisdiction to review their conformity with not only the Constitution but also this Constitutional Law.

6. Electoral Rights

23. The involvement of persons belonging to minorities in the various aspects of life in society is an important factor in their integration; this applies in particular, to what is commonly called public life, i.e. participation in state bodies. Although in most cases the representation of minorities in a state's elected bodies is achieved through the application of the general rules of electoral law, a certain number of countries dispose of specific rules of electoral law providing for special representation of minorities in state bodies². Croatia is one of such countries.

24. In this context, the Commission welcomes the readiness of the Croatian authorities to clarify, through the new Articles 18 and 19, the manner of election of representatives of national minorities.

25. However, in relation to the new Article 18, the Commission notes a certain lack of specificity and elaboration. The sixth paragraph delegates the regulation of the manner of the election of representatives of national minorities to the "law and other regulations stipulating the elections in the Republic of Croatia". The Explanation concerning Article 18 refers to the Law on the Election of Representatives to the Croatian State Parliament. Thus, some of the still unsolved issues seem to have been shifted to laws which are currently under revision.

26. The proposed system of elections raises several concerns:

27. The main one relates to the question of whether the "at least five representatives" referred to in the first paragraph, the "at least one representative seat" mentioned in the second paragraph, and the "at least four representatives" of the third paragraph are additional to, or part of the number of seats of the Parliament to which the general election relates. The second paragraph seems to indicate the first option. From this provision it follows that for the national minorities concerned the number of seats to which they are entitled may be determined by the outcome of the election by universal and equal suffrage. This means that the number of seats to be reserved for representatives of those national minorities cannot be fixed beforehand. This would imply that the number of seats in the Parliament might have to be extended depending on the outcome of the elections, which could result in a derogation of the Constitutional provision fixing the number of seats of Parliament.

² See the Venice Commission report on "Electoral law and national minorities", CDL-INF (2000) 4, and Mr Hartmann's Comments on the Law on the election of members of the representative bodies of local and self-government units in Croatia (CDL (2002) 16).

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

29. If the seats for representatives of national minorities are indeed additional seats, fixed on the basis of the outcome of *universal and equal* suffrage, this would lead to a system of double vote for members of national minorities. In that context, the Commission recalls that the Guidelines on Elections of the Venice Commission state in Principle 2.a. that "each voter has in principle one vote; where the electoral system provides voters with more than one vote, each voter has the same number of votes". According to Principle 2.d.bb., "Special rules guaranteeing national minorities reserved seats or providing for exceptions to the normal seat allocation criteria for parties representing national minorities do not in principle run counter to equal suffrage".

30. The question whether the needs of minority protection may justify a derogation from the principle "one man, one vote" is a complex one and deserves careful consideration. To the extent that this question appears to have been shifted to the Law on Elections, at present under revision, the Commission is at the disposal of the Croatian authorities for a co-operation on this issue.

31. If, on the contrary, the minority seats are not additional but are part of the "regular" number of seats, the question arises of how the number of seats to which the persons belonging to minorities are entitled is guaranteed and what procedure will be followed if the outcome of the elections shows that insufficient minority candidates have been elected.

32. An additional point of concern is the fact that any special voting system for members of minorities requires that the voters concerned and the candidates must reveal that they belong to a national minority (for instance at the moment of voting or in the frame of a census). Persons belonging to certain minorities may be reluctant to do so out of fear for discriminatory treatment and other forms of harassment. Principle 2.d.cc. of the Guidelines on Elections of the Venice Commission states: "Neither candidates nor voters must find themselves obliged to reveal their membership of a national minority". The same observation is valid for the census provided in Article 21 of the draft. In this context it should be recalled that there are many possibilities to secure the confidentiality of the information provided (see, for instance, the regulations in force in South Tyrol). The Commission would therefore strongly favour clarifying which precautions will be taken to effectively protect it.

33. Article 19, which relates to representation of national minorities in the representative bodies of local and regional self-government units, makes it clear that representation is guaranteed, if necessary, through the holding of by-elections with a resulting increase of the membership of the representative body. This means, on the one hand, that the principle of one man one vote is deviated from, and on the other hand, that the same issue arises concerning the necessity to reveal one's belonging to a national minority.

7. Council of National Minorities and Office for National Minorities

34. The explanation concerning Articles 33 and 34 of the draft constitutional law does not seem to clearly indicate whether and to what extent the Council for National Minorities to be

established under Article 33, 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 sixth paragraph of Article 34, will be the continuation of the existing Office for National Minorities. The powers of the proposed Council for National Minorities are rather limited, without a well-determined right to be consulted.

35. While the composition of the Council for National Minorities is regulated in much detail, the composition of the Expert Service is totally left to the Government.

8. Minority Self-Government

36. Article 20 of the draft constitutional law provides for proportional representation of national minorities in the state administration and judicial bodies, as well as in the administrative bodies of self-government units.

37. Article 22 deals with the establishment of minority self-government in local and regional self-government units, to be elected by members of national minorities. Here, the principle of proportionality is not followed. First of all, a threshold is introduced of 1.5 % of the total population of the unit concerned, or more than 200 members in a local unit and more than 500 members in a regional unit. If the threshold is passed, the number of representatives of minorities constituting the minority self-government is fixed on 10 for a municipality, 15 for a town and 25 for a county. If the threshold is not passed, but the number of members of a national minority in the unit is more than 100, one representative shall be elected for that self-government unit.

38. It is to be noted that as compared to the powers and rights allocated to minority self-governments in previous drafts, the new draft means a depreciation of the institution. The decision-making power on proposals concerning the use of national minorities' 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. Here, again, the right to be consulted (rather than to be informed) is not expressly defined.

39. The Commission refers to its observations made in the third and fourth paragraph of section 8 of its previous opinion with regard to most of the questions raised in the last paragraph.

9. Miscellaneous Provisions

40. The Commission notes with regret that Article 14 of the draft constitutional law speaks only of "preservation of national and cultural identity of a national minority" as the purpose of minority associations, but no longer of "promotion", which would have implied a more active approach.

10. Conclusion

41. The new draft of the Constitutional Law represents in different respects, an improvement and clarification as compared to the last draft. The Commission notes, however,

that not all concerns expressed and questions raised by its previous consultations and opinions have been adequately answered, especially not on the issue of voting rights and voting procedures in relation to the representation of national minorities in Parliament.

42. The Commission remains at the disposal of the Croatian authorities for any further co-operation.