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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

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

by

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A. General Comment

1. The following comments replace those made by me in July of this year, which were based upon an earlier draft. I once again follow the structure of the opinion that was previously adopted by the Venice Commission on 6-7 July 2001 (CDL-INF (2001) 14).

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

2. According to article 42 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. The draft, in its English translation, now correctly speaks of "coming into effect" rather than of "promulgation".

3. 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 in virtue of international agreements to which Croatia is a party. It does not cover 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 priority of international law over domestic law.

4. 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 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 proposed Constitutional Law and provisions of previous and later laws concerning the same issues (see also comment 5).

5. 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 Constitutional Law control the exercise of the rights and freedoms laid down in the special laws.

6. 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.

C. List of Minorities

7. It is to be welcomed that the draft does not contain a limitatively formulated list of minorities, contrary to what was the case in some previous drafts.

D. Definition of Minorities

8. Article 3 of the draft 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.

9. 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.

10. The comment made earlier by the Venice Commission is repeated here 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 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).

11. It is to be preferred that the restriction to "citizens" is deleted from Article 3 and is 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 the 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.

12. 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.

13. 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, may be repeated here.

E. Implementing Laws and Hierarchy of Norms

14. The comments made and questions raised in the previous opinion of the Venice Commission still apply. The status of the Constitutional Law as an "organic law" is affirmed

in the Explanation concerning Article 43 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 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.

F. Electoral Rights

15. The main characteristic of the new Article 18 would seem to be its lack of specificity and elaboration. The sixth paragraph delegates the regulation of the manner of the election of representatives of national minority 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 the future amendment of that law.

16. The main unclarity concerns 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 of 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.

17. Article 19 of the draft, which concerns local and regional self-government bodies, in its sixth paragraph, 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.

18. 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, it may be pointed out here 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". It is stated in Principle 2.d.bb. that "Special rules guaranteeing national minorities reserved seats or providing for exceptions to the normal seat allocation criteria for parties representing national minorities". However, this is not intended to deviate from the principle of "one man one vote".

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

20. An additional point of great 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. Members of 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 holds good for the census provided in Article 21 of the draft. It should at least be clarified which precautions will be taken to protect the confidentiality of the information provided.

21. 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 membership of a national minority.

G. Council of National Minorities and Office for National Minorities

22. 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 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.

23. 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.

H. Minority Self-Government

24. Article 20 of the draft 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.

25. 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.

26. 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 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. Here, again, the right to be consulted (rather than to be informed) is not expressly defined.

27. The observations made in the third and fourth 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.

I. Miscellaneous Provisions

28. Article 14 of the draft 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.

J. Conclusion

29. The new draft of a Constitutional Law means in some respects an improvement and clarification as compared to the last draft, but a step backwards in comparison to earlier drafts. Not all concerns expressed and questions raised by the Venice Commission in its consecutive 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.