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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMMENTS

**ON THE CONSTITUTIONAL LAW
ON THE RIGHTS OF NATIONAL MINORITIES
IN CROATIA**

by

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I. Introduction

After several previous drafts had been submitted by the Croatian Government and discussed in Parliament, on most of which the Venice Commission has presented opinions, the Croatian Parliament adopted the present Constitutional Law on the Rights of National Minorities on 13 December 2002.

The following are a few comments on the final text of the Constitutional Law as adopted. These comments are based on the English translation of the text as presented to the Venice Commission.

II. Comments on an Article-by-Article Basis

1. **Article 1** contains a recognition of the obligation of Croatia under international law to respect and protect the rights of national minorities and other fundamental human rights. However, it guarantees that obligation only *with respect to all its citizens*.

Under international law, the Contracting States have the obligation to ensure fundamental human rights *to everyone within their jurisdiction*; see, e.g., Article 1 of the European Convention on Human Rights and Article 2, paragraph 1, of the International Covenant on Civil and Political Rights.

This is worth noting in view of the fact that **Article 5** of the Constitutional Law, in its definition of "national minority in the sense of this Constitutional Law", restricts the guarantees of the Law to Croatian citizens [državljeni]. As has been argued by Professor Matscher, this restriction in itself does not violate Croatia's obligations under international law, provided that those persons under Croatian jurisdiction who express themselves as belonging to a national minority but are not Croatian citizens, enjoy full protection of their fundamental rights without discrimination. Therefore, it would have been advisable if Article 1 of the Law would have made a clear distinction in that respect between minority rights and other human rights, thus doing justice to the general obligation to ensure human rights to everyone under Croatian jurisdiction without discrimination.

2. In that same context, the scope of **Article 2** is not very clear in relation to Article 1. It seems to be formulated as a general guarantee of human rights without discrimination on the basis of, *inter alia*, connection with a national minority, but refers to the documents listed in Article 1.

3. It is important that **Article 2** expressly states that exceptions to, and limitations of the internationally guaranteed human rights are allowed only as foreseen in the relevant international documents. This constitutes a clear and binding criterion for review of the present Law and other laws and regulations for their conformity with international law.

Article 2, in connection with **Article 41**, makes it clear that the rights ensuing from Croatia's international obligations are "acquired rights" which cannot be derogated from by the present Constitutional Law or any other law.

4. **Article 3** makes it clear that positive measures in favour of national minorities are allowed notwithstanding the prohibition of discrimination. It should, however, have added that they are allowed if and to the extent necessary to bring about (greater) substantive equality.

In that context, the second paragraph of **Article 4** is difficult to understand. How can members of national minorities exercise specific minority rights "in an equal manner as other citizens"? Indeed, **Article 7** speaks of "special rights and freedoms of members of national minorities".

5. **Articles 4** *passim*; **7**; **8**; **9, paragraph 1**; **10**; **11, paragraphs 2, 8 and 9**; **12, paragraphs 2 and 3**; **13**; **17, paragraph 1**; **19, passim**; **20 passim**; **22, paragraphs 2 and 3**; **and 24, paragraph 5** refer to (special) laws and regulations. To the extent that these laws and regulations are not specified, this detracts from the clarity as to the scope of the Constitutional Law, and raises the question of the hierarchy between the present Constitutional Law and these laws and regulations. In its response to the previous opinion of the Venice Commission, the Croatian Government stated that the Constitutional Law will prescribe "the principles on which the provisions of the existing special laws are based, and on which the provisions of the future special laws for the regulation of the rights of national minorities shall be based" (CDL (2002) 150, 3 December 2002, p. 4). However, from the final text of the Constitutional Law it appears that this has been done only exceptionally.

6. In previous opinions the Venice Commission has commented upon the definition of "national minority" in **Article 5**, in particular its restriction to Croatian citizens [državljeni], as has the OSCE High Commissioner on National Minorities.

It is important that it is expressly stated that the definition of Article 5 is not meant to be a general definition for Croatian law, but one for the application of the present Constitutional Law only.

The previously made comment should be repeated here, that the qualification "whose members have been traditionally settled in the territory of the Republic of Croatia" requires further specification as an important element determining the scope of the definition.

Although Article 5 does not contain a list of minorities, the Constitution still contains such a list. This "constitutional" issue still has to be solved.

7. **Article 12, second paragraph**, creates the impression that the application of treaty provisions with internal effect is dependent on a stipulation in a local or regional statute, since (at least in the English translation) the two conditions are formulated cumulatively ("and") and not alternatively ("or").

8. **Article 13** is a good example of a provision in the present Constitutional Law which specifies the main elements of a special law which is still to be adopted.

However, the criterion "areas traditionally, or to a considerable number, populated by members of national minorities" is still too vague. Its specification should not be left to the special law but should have been laid down in the Constitutional Law.

9. The words "according to their possibilities" in **Article 15, paragraph 2**, makes the entitlement to financial support dependent on the exercise of discretion. The same holds good for the words "in compliance with the possibilities and according to the criteria set forth by the Government" in **Article 18, paragraph 2**, and the words "they may also provide the funds" and "funds (...) may also be provided" in **Article 28, paragraphs 1 and 2**, respectively.

10. The Venice Commission has extensively commented upon previous draft provisions concerning proportional representation of national minorities in the Croatian Parliament. **Article 19** is in several aspects an improvement as compared to previous drafts. Nevertheless, the present provision still lacks full clarity.

It is not clear how the guarantee, laid down in the second paragraph, of the minimum number of representatives in special electoral units relates to the guarantee of a minimum number of seats in Parliament, laid down in paragraphs 3 and 4.

It is also not very clear how the minimum of one, and the maximum of three representative seats in paragraph 3 relate to the minimum of four representatives of paragraph 4.

Moreover, the way in which, and the electoral system in accordance with which these minima as guarantees of proportional representation will be ensured, is left to a special election law. That law still has to solve several important issues, such as the issue of double vote for members of national minorities and the issue of additional seats in Parliament in derogation of the number of seats fixed in the Constitution. According to **Article 39, paragraph 1**, Article 19 will not be applied before that special law will have come into effect.

Any electoral system guaranteeing proportional representation of national minorities will make the identification of voters as belonging to a national minority necessary. As was stressed by the Venice Commission before, this may require certain safeguards of confidentiality for those members of national minorities for whom this identification may create a certain risk.

11. **Article 20** concerning proportional representation in local and regional self-government units is more specific on certain issues. It expressly provides for the possibility to increase the membership of the representative body concerned, if necessary to achieve proportional representation, and makes by-elections (and consequently double votes) possible if necessary. However, this provision also does not provide for the necessary legal certainty, because the special laws regulating the election of members of the representative bodies of local and regional self-government units, respectively, may derogate from the system laid down in Article 20. In addition, **Article 21** provides that the statutes of local and regional self-government units may derogate from strict proportionality in favour of national minorities.

Moreover, here again, the provision does not contain a confidentiality safeguard against any risks which a voter may have to face when revealing his or her belonging to a certain national minority.

12. **Article 22, paragraph 4** provides that members of national minorities shall have priority in the filling of posts in the state administration and judicial bodies, and in the administrative bodies of self-government units, "under equal conditions". It is not clear which kind of equality is meant and what criteria and procedures will be applied to bring about equality.

13. **Article 31**, which regulates the rights of the councils of national minorities in local and regional self-government units, does provide for the right to be informed, but not for the right to be consulted about issues of significance for national minorities.

Article 32, which does provide for consultation, relates to general acts only.

The main weakness remains, however, that the councils have no governing power whatsoever.

14. **Article 32, paragraph 5** gives the right to the Government of the Republic to put a general act before the Constitutional Court to have its conformity with the Constitution (and law?) reviewed, but such a right is not expressly given to the council of national minority which raised the issue, not even if the Government fails to initiate the required procedure in time. This provision should contain a reference to **Article 38, paragraph 3**, and the relationship between the two provisions should be clarified.

15. **Article 35**, dealing with the rights and functions of the Council for National Minorities, entails the right to take initiatives and make proposals, the right to request information and the right to invite and request the presence of representatives of state, local and regional bodies, but does not provide for the right to be consulted about issues of significance for national minorities. Here, again, any governing power is lacking.

16. **Article 36, paragraph 2** states that the members of the Council for National Minorities shall also be representatives of national minorities in the Croatian Parliament. It is not clear how this provision relates to the first paragraph and the numbers of membership mentioned there.

Paragraph 3 provides that the President and two Deputy Presidents of the Council are appointed by the Government from among its members. In view of the composition and functions of the Council it might have been advisable to leave it to the members of the Council to elect the Presidency from among their midst.

17. **Article 41** codifies in an express way the priority of Croatia's treaty obligations over its domestic law including the present Constitutional Law. It does not regulate, however, by what procedure possible disputes about interpretation or application will be solved.

III. Concluding Observation

It may be concluded that the final text of the Constitutional Law on the Rights of National Minorities as adopted means in many ways an improvement as compared to earlier drafts commented upon by the Venice Commission.

As appears from the above-made comments, there are still several issues which require further clarification, while some important issues still need to be worked out in special laws. Moreover, the rights and functions of the representative bodies of national minorities have not been regulated satisfactorily in all respects.

Certain issues will be clarified in practice, while the main shortcomings may be solved by the drafting of special laws. In the long run, however, it would seem advisable to supplement and revise the present Constitutional Law on the basis of legal practice and taking into account subsequent special laws. The special status of the present Law as a constitutional law makes it preferable that the rights of national minorities are regulated as completely as possible in this Law.

The Venice Commission should be prepared to assist the Croatian authorities in their future endeavour to draft the required special laws and to improve the present Constitutional Law. Priority should be given to the (amendments to the) laws regulating the election of representatives to Parliament and the election of representatives in local and regional self-government units.