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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

ADOPTED BY PARLIAMENT
ON 13 DECEMBER 2002

On the basis of comments by

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

Introduction

1. Following the request by the Parliamentary Assembly to follow the process of 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 has issued opinions on most of the drafts of this law that had been prepared by the Croatian Government ever since 1995.

2. On 13 December 2002, the Croatian Parliament adopted the Constitutional Law on the Rights of National Minorities (hereinafter: the Constitutional Law). The Constitutional Law was adopted by a two-thirds majority vote of all representatives. It entered into force on the date of its publication, on 23rd December 2002.

3. At the 53rd plenary session of the Commission, from 13 to 14 December 2002, Mrs Snjezana Bagic, the Head of the Legislative Office of the Croatian Government, briefly presented the most important amendments made to the latest draft Constitutional Law. The Commission noted, among other, that full implementation of the guarantees provided by the Constitutional Law to ensure the effective protection of the rights of national minorities require the adoption of special laws and regulations (in particular, minority representation in Parliament, and in local and regional self-government bodies). The Commission therefore reiterated its readiness to co-operate with the Croatian Government in the preparation of these laws.

4. At present, the first of these special laws is already in preparation. In the beginning of February 2003, the Croatian Government prepared the draft Law on amendments to the Law on the Election of Members of the Representative Bodies of Local and Regional Self-Government (hereinafter: the Law on the Local Elections) and brought it before the Parliament, to be adopted through an urgent procedure. This law should ensure the implementation of Article 20 of the Constitutional Law, e.g. the proportional representation of national minorities in local and regional self-government bodies (see *infra*, point V).

5. However, the Croatian Government had not forwarded the draft amendments to the Law on the Local Elections to the Venice Commission, and has not requested its co-operation in the revision of this law.

6. It is, therefore, only the Constitutional Law, as adopted on 13 December 2002 that is the object of the present draft opinion.

I. General remark

7. The Venice Commission welcomes the fact that the final text of the Constitutional Law represents, in many ways, a significant improvement as compared to earlier drafts commented upon by the Venice Commission. The Commission, nevertheless, regrets that a certain number of issues still require further clarification. The most important of them are briefly commented below. As to others, the reference is made to the observations made by the Commission in its previous opinions.

II. Special laws and regulations

8. Numerous articles of the Constitutional Law refer to (special) laws and regulations (Article 4 *passim*; Articles 7 to 9 paragraph 1; Articles 10 to 11, paragraphs 2, 8 and 9; Article 12, paragraphs 2 and 3; Articles 13, 17 paragraph 1, 19, *passim*, and 20 *passim*; Article 22, paragraphs 2 and 3, and Article 24 § 5). The fact that these laws and regulations are not specified by the relevant articles detracts from the clarity as to the scope of the Constitutional Law, and raises the question of the hierarchy between the 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*" (see CDL (2002) 150, 3 December 2002, p. 4). The Commission regrets that this has been done rather exceptionally in the text of the Constitutional Law.

9. Article 13 is an example of a provision in the Constitutional Law which does specify the main elements of a special law which is still to be adopted (revised). However, the criterion "areas traditionally, or to a considerable number, populated by members of national minorities" remains too vague. Its specification should have been laid down in the Constitutional Law itself.

10. As to the formal status of the present Constitutional Law, it does not seem to have been satisfactorily clarified.

III. Scope of application

11. Under Article 1 of the Constitutional Law, Croatia reiterates its obligation under international law, to respect and protect the rights of national minorities and other fundamental human rights and freedoms *to all its citizens (drzavljeni)*. This restriction is furthermore confirmed in Article 5 of the Constitutional Law, in its definition of "national minority in the sense of this Constitutional Law". As the Commission had the occasion to remark, this restriction in itself is not contrary to Croatia's obligations under international law, as long as those persons under Croatian jurisdiction who express themselves as belonging to a national minority but are not Croatian citizens, do enjoy full protection of those fundamental rights guaranteed under the Constitution, under other domestic regulations and under international law, to which everybody is entitled on an equal basis. It would nevertheless 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.

12. With regard to the qualification "whose members have been traditionally settled in the territory of the Republic of Croatia", being an important element determining the scope of the definition of "national minorities", the Commission refers to the observations made in its previous opinion (CDL (2002) 111, paragraph 20).

13. Contrary to what indicates its title, in some of its wording the Constitutional Law seems to concern human rights in general as well as specific rights of national minorities. In relation

to Article 2, the Commission notes a certain lack of clarity. It seems to be formulated as a general guarantee of human rights and freedoms, and prohibition of discrimination on the basis of, *inter alia*, "connection with a national minority", but it refers to the international instruments listed in Article 1.

14. It is to be welcomed that Article 3 allows for positive measures in favour of national minorities notwithstanding the prohibition of discrimination. As to the possible positive measures, the Commission is of the opinion that such measures are only allowed if and to the extent necessary to bring about (greater) substantive equality.

15. In this context, the objective of the second paragraph of Article 4 seems unclear; how shall persons belonging to national minorities exercise the fundamental rights and freedoms stipulated by the Constitution and this Constitutional Law "in an equal manner as other citizens (*gradjani*)"? Considering that the term "citizen" as used here, does not relate to the quality of citizenship, this provision seems to concern, *prima facie*, the "classic" fundamental rights and freedoms. Indeed, Article 7 of the Constitutional Law provides for "special" rights and freedoms of persons belonging to national minorities.

16. In domestic law, including the present Constitutional Law. It does not regulate, however, by what procedure possible disputes about interpretation or application will be solved.

17. As to some specific rights stipulated in the international agreements with internal effects, provided for by Article 12 § 2, their exercise seems to be dependent on the 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").

IV. Limitations and derogations

18. With respect to possible derogations and limitations of fundamental rights, the Commission welcomes the explicit provision contained in Article 2, providing that the guaranteed human rights and freedoms may only be limited in accordance with the relevant international instruments. This constitutes a clear and binding criterion for review of the present Law and other laws and regulations for their conformity with international law.

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

V. Minorities representation in public life

Parliament

20. Article 19 is in several aspects an improvement as compared to previous drafts. It nevertheless remains unclear as to how the guarantee of the minimum number of representatives in special electoral units (§ 2) relates to the guarantee of a minimum number of seats in Parliament (§ 3; § 4). Furthermore, it is not very clear how the minimum of one, and the maximum of three representative seats in § 3 relate to the minimum of four representatives, in § 4. The system that shall allow these minima as guarantees of

proportional representation to be ensured, is to be established by a special election law. In accordance with Article 39 § 1, Article 19 will not be applied before the entry into force of the election law.

21. In this respect, it is to be noted that in accordance with the Constitutional Law on the implementation of the Constitution, the national election law should be passed one year before the holding of the regular parliamentary elections. Under the Constitution, the next parliamentary elections in Croatia should be held in early 2004 (not later than 60 days after the expiration of the mandate of the Parliament, i.e. January 2004). The new (or revised) national elections law should therefore be adopted in the coming month.

22. The Commission recalls that the election 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. Moreover, any electoral system guaranteeing proportional representation of national minorities will make the identification of voters as belonging to a national minority necessary. As the Commission had stressed before, this may require a certain safeguards of confidentiality for those persons belonging to national minorities for whom this identification may create a certain risk.

Local and regional self-government units

23. With regard to minorities representation in local and regional self-government units, the Constitutional Law is more specific. Article 20 not only expressly provides for the possibility to increase the membership of the representative body concerned, in order to achieve proportional representation, but also makes by-elections (and consequently double votes) possible, if necessary. However, the Commission notes the lack of the necessary legal certainty, as 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 the Constitutional Law. Furthermore, Article 21 provides that the statutes of local and regional self-government units may derogate from strict proportionality in favour of national minorities. 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.

24. In this context, the Commission recalls that in accordance with Article 61 of the Local Election Law, by-elections ought to have been conducted within 90 days of the official publication of the 2001 population census, in those municipalities, towns and counties in which the local elections had not resulted in the election of the number of minority representatives proportional to their share in the population. The deadline would have been 15 September 2002. It was, however, missed, for two reasons: the absence in the Local Election Law of a description of the procedure for holding by-elections and second, the continual postponement of adoption of the new constitutional law on the rights of national minorities.

The new Constitutional Law has repealed Article 61 of the Local Election Law (Article 43 § 2), and set a new 90-day deadline starting from its entry into force (23/12/2002), for remedying the lack of minority representation in the concerned bodies of local and regional self-government units.

25. Once again, in order to ensure the implementation of the Constitutional Law, the new or revised law on local and regional elections is to be adopted by the end of March 2003.

Administrative and judicial bodies

26. In accordance with Article 22 § 4, the persons belonging to national minorities shall have priority in the filling of posts in the state administration and judicial bodies, as well as 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.

VI. Financial support

27. Several articles of the Constitutional Law provide for financial support of the State for ensuring the effective exercise of the rights of national minorities. The entitlement to funding is however dependent on the exercise of discretion : in accordance with the Constitutional law, the State and the local and regional self-government units shall provide finances "according to their possibilities" (Article 15 § 2), "in compliance with the possibilities and according to the criteria set forth by the Government" (Article 18 § 2). Furthermore, Article 28 § 1 and § 2 provide that "they may also provide the funds" and "funds (...) may also be provided", respectively.

VII. Institutions of and for minorities

28. The Commission is concerned with the fact that the rights and functions of the representative bodies of national minorities have not been regulated satisfactorily in all respects. Furthermore, the main weakness of the Constitutional Law remains the absolute lack of governing power of the councils.

Councils of national minorities in local and regional self-government units

29. Article 31 on 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. Furthermore, Article 32, which does provide for the right to consultation, relates to general acts only.

The Council for National Minorities

30. Article 35 on 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.

31. In accordance with Article 36 § 2, 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 members mentioned there.

32. The Commission also notes that the President and two Deputy Presidents of the Council are appointed by the Government from among its members (Article 36 § 3). 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.

33. With regard to the appointment of the members of the Council for National Minorities, the President and Deputy Presidents, the Constitutional Law sets another 90 days deadline, which expires on 23 March 2003.

VIII. Constitutional control

34. Article 32 § 5 establishes the right of the Government of Croatia to initiate the procedure for the review of the conformity of a general act with the Constitution (and law ?) before the Constitutional Court. The Commission regrets that such a right is not expressly given to the council of national minority that raised the issue, not even if the Government fails to initiate the required procedure in time.

35. This provision should contain a reference to Article 38 § 3, and the relationship between the two provisions should be clarified.

CONCLUSION

36. The new Constitutional Law has not clarified all the issues raised by the Commission in its previous opinions. A number of these 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.

37. The Venice Commission remains at the disposal of the Croatian authorities for further co-operation in the process of revision of the special laws necessary for the implementation of the Constitutional Law, in particular the laws regulating the election of representatives to Parliament, and the election of representatives in local and regional self-government units.