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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

R E P O R T¹

**ON THE IMPLEMENTATION
OF THE CONSTITUTIONAL LAW
ON HUMAN RIGHTS AND FREEDOMS
AND ON THE RIGHTS OF
ETHNIC COMMUNITIES AND MINORITIES
IN THE REPUBLIC OF CROATIA**

¹ *This document is drawn up by Mssrs. Matschher, Malinverni and Nicolas, Rapporteurs of the European Commission for Democracy through Law (Venice Commission). It will be submitted for adoption to the Commission, at its next plenary meeting (17-18 May 1996).*

REPORT

on the implementation of the constitutional law on human rights and freedoms and on the rights of national or ethnic communities or minorities in the Republic of Croatia.

I. Introduction

1. On 16 February 1996, the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe requested an opinion from the Venice Commission, in view of Croatia's request to accede to the Council of Europe, on the constitutional situation in Croatia and more particularly on the implementation of constitutional law on human rights and freedoms and on the rights of national or ethnic communities or minorities in the Republic of Croatia as well as on human rights protection mechanisms.
2. The Venice Commission created a working group at its 26th meeting (1-2 March 1996) and appointed Messrs. Matscher, Malinverni and Nicolas as Rapporteurs.
3. The rapporteurs, assisted by Mr Giakoumopoulos and Miss Martin of the Secretariat of the Council of Europe, went to Zagreb from 14 to 16 March (the programme of the mission is appended to this report). The persons participating in the mission wish to thank the Croatian authorities for their assistance.
4. In their analysis the rapporteurs took into account *inter alia* the report on the legislation of the Republic of Croatia drawn by Mr Franz Matscher and Mme Gro Hillestad Thune, dated 8 December 1994 (Doc AS/Bur/Croatia (1994)2).
5. Having regard to the urgency of the request of the Committee on Legal Affairs and Human Rights, the rapporteurs had focused on questions concerning human rights and the rights of minorities and in particular on the implementation of the constitutional law of 1991 on human rights and freedoms and the rights of ethnic or national groups or minorities in the Republic of Croatia (hereafter "the constitutional law of 1991").
6. As regards the general constitutional situation, the rapporteurs wish to state simply that they share the worries of the Parliamentary Assembly and of the Congress of Local and Regional Authorities of Europe in respect of the recent election of the Mayor of Zagreb. They note that the law presently in force made it possible on two occasions for the President of the Republic to refuse the nomination of the person elected, to the detriment of fundamental principles of democracy.
7. Apart from this regrettable incident, the rapporteurs found that the general situation in Croatia indicates that the system is functioning adequately, with due respect for the rule of law and democracy, and that the authorities apparently are making all possible efforts to lead the country out of its difficult situation due in particular to the period of conflict, and to bring Croatia to the level of the standards of the Council of Europe and to a rapid accession to the organisation. This was the unanimous wish of all persons met by the rapporteurs, including members of the opposition and representatives of minorities.

II. The suspension of certain provisions of the Constitutional Law of 1991

8. Several provisions of the Constitutional Law of 1991, which had been adopted in the context of Croatia's independence, have been temporarily suspended by a constitutional law dated 20 September 1995. Under this law, the suspension of these provisions (Articles 13, 18 paragraphs 1 and 5, 21 to 51, 52 to 57, 58, 60, and 61) will continue until the next census in the Republic of Croatia. The suspension mainly concerns three points:

1. the special status granted to districts where members of ethnic and national communities represent the majority of the population in accordance with the census of 1991;
2. the right to representation and participation in public institutions of communities and minorities which make up more than 8% of the population, also in accordance with the census of 1991; and
3. the international supervision of the implementation of this law, including the question of the provisional Court of Human Rights in Croatia provided for in Article 60 of this law).

As regards points 1 and 2, the reason advanced for the temporary suspension was that these provisions were no longer pertinent since the number of Serbs, the only minority concerned, had considerably decreased since 1991.

9. However, the rapporteurs of the Venice Commission are of the opinion that the suspension of the law was not indispensable. The provisions could validly have continued in force, although in that case they would not for the moment have any practical application because of the demographic changes which have occurred.

10. Moreover, the rapporteurs remain concerned at the discouraging psychological effect that the suspension would certainly have on minorities and displaced populations which would like to remain in or return to Croatia.

11. In the opinion of the rapporteurs, the Constitutional Law of 1991 deprived of its above provisions cannot be said to constitute an adequate response to the new situation. A revision of the suspended provisions is necessary (see below point 4) irrespective of the results of the census.

III. The Census

12. The census was initially scheduled for April 1996. However this schedule has proved unachievable and none of the persons met by the rapporteurs was able to indicate the date which is now envisaged for the next census.

13. In the opinion of the rapporteurs it seems preferable to wait until the situation has calmed down on the territory of Croatia and for the conditions for the return and the peaceful settlement of displaced populations to be plainly met before organising, in co-operation with the

international community, the next census. This was also the view of all persons met by the rapporteurs who expressed an opinion on the point.

IV. The Content of the Constitutional Law of 1991

14. The provisions in force of the constitutional law of 1991 guarantee the protection of human rights as they are enshrined in several international instruments including the European Convention on Human Rights (Articles 1 and 2 of the Law). Moreover, they guarantee certain rights to “or ethnic or national minorities or communities”, in particular the right to participate in public affairs (Article 6 d), the right to use freely their language and their alphabet in public or in private (Articles 7, 8 and 10), the right to use their national and ethnic emblems and symbols (Article 9), the freedom to create cultural institutions with a view to preserving their national and cultural identity (Article 11), and the right to education in their mother tongue (Articles 14 to 17). These provisions determine specifically the requirements of the constitutional provision of Article 15 which guarantees the equality of rights of all members of nations and minorities as well as their rights to freely express their identity and to freely use their own languages and scripts, writing, and their right to cultural autonomy.

15. As a whole the above provisions are compatible with international standards and in particular with the Framework Convention for the Protection of National Minorities - to which Croatia has declared that it wishes to become a party - and are inspired also by the principles set out in the European Charter of Regional and Minority Languages and in the proposal of the Venice Commission for a European Convention for the Protection of Minorities (Articles 8 to 12).

16. Moreover, the rapporteurs note that the protection of minorities in Croatia is also based on international instruments. They note with satisfaction that Croatia signed and ratified in February 1996 the International Covenant on Civil and Political Rights (whose Article 27 guarantees the right to cultural identity for persons belonging to minorities) as well as its Optional Protocol. They also note that Croatia has concluded bilateral agreements with Hungary, Slovenia and Romania which include provisions concerning the protection of minorities.

17. The suspended provisions of the law of 1991 gave specific rights of representation and participation in public institutions (Parliament, government and higher judicial bodies) to minorities representing at least 8% of the population. These provisions aimed mainly at protecting the most important minorities in Croatia and in particular the Serb minority by granting them an effective representation at the various levels of the legislative, executive and judicial powers. In effect, whereas 16 minorities are present in Croatia, only the Serb minority was concerned by these provisions.

18. Moreover, in accordance with the provisions of Article 18 paragraphs 2 to 4, which remain in force, the minorities which represent less than 8% of the whole population are represented by 5 deputies in Parliament which are deemed to represent the interests of all minorities recognised on the territory of Croatia.

19. All provisions relating to the rights of minorities representing 8% have been suspended. Thus, while before the suspension the Serb minority had 12 representatives in Parliament it is now only represented by 3 representatives. In addition, the provisions granting a special status to those districts where the Serb minority was a majority are no longer applied.

20. Having regard to the importance of granting particular rights to concentrated minorities making up a substantial part of the population to participation in public institutions and in the administration of matters concerning them, the rapporteurs recall Article 11 of Recommendation 1201 (to which reference is also made in the Croato-Hungarian Treaty of 5 April 1995): "in the regions where they are a majority, the persons belonging to a national minority shall have the right to have at their disposal appropriate local or autonomous authorities or to have a special status, matching their specific historical and territorial situation and in accordance with domestic legislation of the State".

21. Therefore, although recent events are capable of justifying a revision of certain provisions of the Constitutional Law of 1991 - in particular those concerning the special status of districts mainly populated by persons belonging to minorities - the rapporteurs stress that this revision should not lead to the abolition of any special status but should rather institute a regime of local self-government adapted to the new situation. In this respect, it is of course for the national legislature to determine the principal characteristics of that regime. However the new provisions should, in line with Recommendation 1201 (1993) and with the European Charter of Local Autonomy, guarantee that concentrated minorities will enjoy the right to regulate and manage an important part of public affairs. The rapporteurs refer in this respect to the opinion of the European Commission for Democracy Through Law on the interpretation of Article 11 of Recommendation 1201 (1993) of the Parliamentary Assembly (Document CD-INF (96)4).

22. In the opinion of the rapporteurs, a special status should be granted to concentrated minorities making up a substantial number of the population irrespective of the total percentage that such a minority represents at national level. This point is of particular relevance to those territories presently under international administration as well as to displaced populations.

V. The human rights protection mechanisms

23. Under Article 58 of the Constitutional Law of 1991, it was provided that an international body was to supervise the implementation of those provisions governing special status districts. This body would have the power to issue recommendations that the Republic of Croatia should implement. Moreover the Constitutional Law of 1991 envisaged, in its Articles 60 and 61, the establishment of a provisional Court of Human Rights partly composed of non-nationals, to which every citizen of the Republic of Croatia could appeal. The Court in question was provisionally established pending the establishment of a special Tribunal on Human Rights composed of members nominated by the European Union and by the Republics of the former Yugoslavia under an arrangement contemplated at the Hague Conference.

24. To date, this Court has not been created and those provisions relating to international supervision and co-operation as well as those concerning judicial protection (Article 60 and 61 of the Constitutional Law of 1991) have been suspended. Furthermore, the idea of creating a Court of Human Rights for the Republics of the former Yugoslavia seems to have been abandoned.

25. During the course of their mission, the rapporteurs applied themselves to evaluating, after consultation with all persons met, the present viability of the establishment of such a Court.

26. The Constitution of the Republic of Croatia contains several provisions on Human Rights (Fundamental Principles, Chapter III: Fundamental Rights and Rights of Citizens), and Article 15 of the Constitution refers specifically to the rights of minorities. All these constitutional provisions and the rights included in international treaties which are incorporated into the domestic legal order as soon as they are ratified and published (Article 134 of the Constitution) can be invoked before any tribunal and before the Constitutional Court. The latter can be seized by means of an individual application, and this possibility has allowed the Court to establish since its creation an important corpus of human rights case law (see in particular the reports published in the Bulletin of Constitutional Case Law of the Venice Commission). The proper functioning of the Constitutional Court and the full confidence which it enjoys were unanimously recognised by all persons met by the rapporteurs.

27. The work carried out by the Constitutional Court has already been considered in Mr Matscher's and Mme Thune's report of 1994 (see Chapter III:4/a). In 1995, the Constitutional Court was seized of 642 applications .

28. The establishment of a provisional Court of Human Rights could have a negative effect on the process of introducing applications before the Strasbourg organs:

To the extent that it might be considered as an international court detached from the Croatian legal order, proceeding before the provisional Court of Human Rights could deprive Croatian citizens of the right to seize the Commission on Human Rights, Article 27 ECHR prohibiting the Commission from examining a request "already submitted to another procedure of international investigation or settlement."

In addition, if it were to be considered as an integral part of the Croatian legal order, it would be included in the domestic remedies which must be exhausted in accordance with Article 26 ECHR. This would render the road to Strasbourg even longer, as such remedies would then include an ordinary appeal, an appeal to the Supreme Court, a constitutional appeal to the Constitutional Court and, finally, an appeal before the provisional Court of Human Rights.

29. Moreover the accession of Croatia to the Council of Europe, the undertaking of certain commitments comprising *inter alia* the ratification of the European Convention of Human Rights and its additional Protocols, the recognition of the Commission's competence to deal with individual applications (Article 25 of the Convention) and of the competence of the European Court of Human Rights (Article 46) also constitute means for the protection of human rights and to a certain extent of the rights of minorities.

30. Having regard to these considerations, the rapporteurs have reached the conclusion that the establishment of a provisional Court of Human Rights as it is provided for in Article 60 of the Constitutional Law of 1991 is not now an apposite or necessary means of protection.

31. Nevertheless, the rapporteurs recognise also that the European Convention on Human Rights (which does not contain any provisions guaranteeing rights of minorities as such) and the Framework Convention for the Protection of National Minorities (whose mechanism is not very strict) are not in themselves adequate for the purposes of reestablishing as soon as possible the confidence of minorities and of the populations of those territories presently under international control (UNTAES) as well as the confidence of displaced populations. The rapporteurs thus place particular emphasis on the right of refugees and displaced persons throughout the whole territory of former Yugoslavia to return to their original homes, to recover their property or to receive compensation for the loss of it (Recommendation 1287 (1996) of the Parliamentary Assembly on refugees, displaced persons and reconstruction in certain countries of the former Yugoslavia).

32. In these circumstances the rapporteurs strongly recommend the creation of a body with a partially international composition integrated into the Croatian domestic legal order.

33. The idea of an Ombudsman has been put forward. However, the rapporteurs consider that this institution would not bring about sufficient confidence, having regard to the lack of any decision-making power of the Ombudsman (who can issue only recommendations).

34. In consequence, the rapporteurs have envisaged the possibility of allowing for the Constitutional Court to sit as an enlarged body in circumstances where it is seized of questions concerning minority rights. For the examination of such cases, the Constitutional Court would be composed of the Croatian constitutional judges supplemented on a provisional basis by a number of international judges. Its jurisdiction would be limited to cases concerning an alleged violation of constitutional or other provisions on minorities.

35. Although this proposal requires an amendment of the Constitution and of the Constitutional Law on the Constitutional Court (which requires a 2/3 majority in Parliament), the institution of such a Chamber would have the advantage of not creating an additional degree of jurisdiction and of being a purely internal court which would develop Croatian case law. It would also have the advantage of not posing problems in respect of Article 27 ECHR.

36. The Venice Commission declares that it is ready to co-operate with the Croatian authorities in order to define the competence, the composition and the functioning of this enlarged Chamber. It also invites the Croatian authorities to formulate, in the light of Resolution (93) 6, any other proposal.

37. In addition, despite the evident confidence that the functioning of the Constitutional Court unanimously inspires, the rapporteurs have noted that among the high number of applications brought before the Constitutional Court only a few relate to rights of minorities and that these are all tied to questions of constitutional rights. As a result, the rapporteurs consider that the reestablishment of the confidence of the populations concerned and of those on the territories which are now under international administration requires the implementation of a

large-scale information campaign on human rights and the rights of minorities.

38. This campaign could be led by the recently created Croatian Institute of Human Rights and presided by a judge of the Constitutional Court, which with the help of financial and supplementary support could be entrusted to promote the legal and procedural possibilities for protecting human rights and the rights of minorities, under present law before the ordinary courts, the Constitutional Court, the UNTAES committees and the Human Rights Committee of the United Nations, as well as those which will exist in the future, notably when Croatia will have ratified the European Convention on Human Rights and have recognised the competence of the European Commission and the European Court of Human Rights.

39. The rapporteurs are of the view, in effect, that notwithstanding certain legal lacunae and certain weak points as to their implementation (for instance inadequate provision for civil compensation, or for the prosecution of certain terrorist acts against minorities), the laws in force warrant being widely disseminated, will contribute to the protection of and respect for human rights and the rights of minorities, and will allow for the integration and the peaceful return of members of the minorities concerned to the Republic of Croatia.

VI. Conclusions

Having regard to the constitutional situation as a whole in Croatia and to the Constitutional Law of 1991 on human rights and the rights of minorities and their judicial protection, the Venice Commission rapporteurs recommend:

- that the suspended provisions of the Constitutional Law of 1991 be revised as soon as possible in order to ensure that persons belonging to minorities are guaranteed rights in the field of local autonomy in accordance with the European Charter of Local Self-Government and Recommendation 1201(1993);

- in order to subject the protection of minorities to a certain degree of international supervision on a provisional basis, that an enlargement of the Constitutional Court be provided for such as to allow it, when deciding upon cases concerning the rights of minorities, to comprise international judges. Such a proposal may be considered to be an adequate confidence-building measure;

- that a large information campaign for the promotion of the legal and procedural possibilities of protection of human rights and the rights of minorities be launched, in particular through the Croatian Human Rights Institute and with the help of the Council of Europe;

The rapporteurs reiterate, finally, their readiness to assist, within the fields of their competence, any institution concerned in the process of the elaboration and of the implementation of the above measures as well as of any other measure aiming at reinforcing the confidence of the populations concerned and at promoting human rights and the rights of minorities in Croatia.

**PROGRAMME OF THE VISIT
OF THE RAPPORTEURS
OF THE COMMISSION FOR DEMOCRACY THROUGH LAW**

(Zagreb, 15-16 March 1996)

Friday, 15 March 1996

- 09.00 Ministry of Justice - Meeting with the Interdepartmental Group
Ms Dubravka Šimonovi_, Head of Department for Human Rights; Mr Slavko Zadnik, Deputy Public Prosecutor of the Republic of Croatia; Dr Siniša Rodin, teaching assistant, Faculty of Law, Zagreb; Ms Ivana Imamovi_, Counsellor, International Department Ministry of Justice
- 12.15 Ministry of Administration - Mr Antun Palari_, Assistant Minister responsible for local self-government
- 13.30 Constitutional Court - Mr Zdravko Bartov_ak, Vice-president; Dr Nikola Filipovi_, Judge
- 15.00 Working lunch at the Ministry of Foreign Affairs
- 16.00 Ministry of Foreign Affairs - Dr Ivan Šimonovi_, First Vice-minister, Ms Snje_ana Sremi_, Head of International Law Department
- 17.15 Government's Office for Ethnic and National Communities or Minorities - Mrs Milla Šimi_, Deputy Head
- 20.00 Dinner: Dr Ivan Šimonovi_, First Vice-minister of Foreign Affairs
- 22.30 Croatian Social Liberal Party: Mr Ivo Škrabalo, M.A., elected major of Zagreb

Saturday, 16 March 1996

- 08.30 Mr Milorad Pupovac, Democratic Forum, Member of Parliament; Mr Vladimir Ivicovi_, Barrister; Prof. Predraj Šibka
- 10.00 Croatian Bar Association: Mr Marijan Han_ekovi_, President; Mr Arno Vi_i_, National Vice-president of the International Bar Union; Mr Darko Horvat, Secretary of the Bar; Mr Zvezdana Znidar_i_-Begovi_, Barrister
- 13.00 Lunch: Dr Stanko Nick, Chief Legal Advisor of the Ministry of Foreign Affairs

The delegation was escorted by an efficient interpreter and by Mrs Nives Malenica, Counsellor of the Department for European Integrations of the Ministry of Foreign Affairs.