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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

CONSOLIDATED OPINION ON THE LAW ON THE ELECTION OF MEMBERS OF THE REPRESENTATIVE BODIES OF LOCAL AND REGIONAL SELF-GOVERNMENT UNITS OF CROATIA

Adopted by the Venice Commission at its 50th Plenary Meeting (Venice, 8-9 March 2002)

on the basis of comments by:

Mr Pieter VAN DIJK (Member, Netherlands)
Mr Christof HARTMANN (Expert, Germany)
Ms Hanna SUCHOCKA (Member, Poland)
Mr Franz MATSCHER (Member, Austria)

Introduction

1. Following the local and regional elections held in Croatia in May 2001, the Congress of Local and Regional Authorities of Europe (CLRAE) requested the Commission at its 47th Plenary Meeting, held in Venice on 6-7 July 2001, to provide its opinion on the Croatian law on local and regional elections. This request was reiterated by letter of 6 September 2001, indicating the particular concerns of the CLRAE with regard to minority issues as regulated by this law, including the respect of the principle of proportional representation, the use of the 2001 census to determine minority population levels, the relationship between the law on local and regional elections and other laws such as the draft Constitutional Law on the Rights of National Minorities in Croatia, the arrangements with respect to internally displaced persons and the identification of voters by their ethnicity.

2. This opinion examines the Law as adopted by the Croatian Parliament on 6 April 2001, in particular from the perspective of minority protection. The following documents have also been taken into account: the Opinion of the Venice Commission on the Constitutional Law on the Rights of National Minorities in Croatia (CDL-INF (2001) 14); its Opinion on the Amendments of 9 November 2000 and 28 March 2001 to the Constitution of Croatia (CDL-INF (2001) 15); its report on Electoral Law and National Minorities (CDL-INF (2000) 4); the CLRAE Report on the Local Government Elections in Croatia of 11 June 2001; the Final Report of the Office for Democratic Institutions and Human Rights (ODIHR) on Local Government Elections of 11 July 2001; and the Opinion on Croatia of the Advisory Committee on the Framework Convention for the Protection of National Minorities (Advisory Committee) of 6 April 2001 (CM (2001) 88).

3. General considerations on electoral systems and their effects on the protection of the rights of national minorities are dealt with in the comments of Mr Hartmann (CDL (2002) 16, at 3.1 and 3.2) and in the Commission's report on Electoral Law and National Minorities (CDL-INF (2000) 4). The present opinion was adopted by the Commission at its 50th Plenary Meeting, held in Venice on 8-9 March 2002.

I Persons entitled to vote

A Age

4. The right to vote is guaranteed under this Law to persons 18 years and over. Whereas it is not unknown to grant the vote to persons younger than this (some South American countries have indeed lowered the voting age to 15 or 16 years), the right to vote is commonly granted at 18 years and this condition may certainly be said to be in conformity with international standards. This condition has no special impact on minorities.

B Nationality

5. There is a growing tendency in Europe to grant the right to vote for local representative bodies not only to citizens but also to residents who are not citizens of the country concerned, but have had residency there for a considerable period of time (not necessarily permanent residence or domicile within the meaning of various laws). This phenomenon may be observed within the member States of the European Union (subject to particular arrangements taking into account the situation in each member State). In addition, the Council of Europe Convention on the Participation of Foreigners in Public Life at Local Level (1992) recommends granting

foreigners the right to vote and stand for local elections provided that they have been lawfully and regularly resident in the host country during the five years preceding the election.

6. The restriction of the right to vote to Croatian citizens, in the first paragraph of Article 2 of the Law, deserves reconsideration from this perspective.

7. In relation to minorities, reference is made here to the Commission's Opinion on the Constitutional Law on the Rights of National Minorities in Croatia (CDL-INF (2001) 14 at p. 3), which stated that "except in the case of political representation at levels other than the local level, citizenship is generally irrelevant to the content of internationally prescribed minority rights". The Commission further stated (at p. 4) that the provision in the Croatian Constitution restricting the right to vote and the right to take part in the conduct of public affairs to citizens "may generate some problems for the effective enjoyment of these rights by persons belonging to minorities who are not, or not yet, citizens of Croatia". This restriction would seem to be the more problematic since the 1991 Law on Citizenship is said to be disadvantageous to those who are not ethnic Croats, whereas ethnic Croats who live outside Croatia do have the right to vote (see the CLRAE draft Report at p. 5, the ODIHR Final Report at p. 7, the Opinion of the Advisory Committee § 27 and below). It would be advisable to revise both the Constitution and the 1991 Law on Citizenship in these respects.

8. Finally, Article 9 of the Law on Voter Registers requires voters to be identified by ethnicity. It is not clear whether that requirement has a legitimate aim, given the fact that there are no separate elections for members of minorities. Since the voter registers are public documents, the requirement may involve a risk for persons belonging to certain minorities (see the Opinion of the Advisory Committee § 19). It must be recalled that, according to Article 3, paragraph 1 of the Framework Convention for the Protection of National Minorities, "every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such".

C Permanent Residence

9. The requirement of permanent residence in the unit concerned raises the issue of special facilities for displaced persons in Croatia, for whom it remains problematic to change permanent residence (see, with regard to the 2001 local elections, the CLRAE draft Report at pp. 12-13 and the ODIHR Final Report at pp. 8 and 19). The application and interpretation of the term "permanent residence in the area" are of particular importance within the current political context in Croatia, in which the issues of the return of Serb refugees, equal opportunity for citizenship rights regardless of ethnicity and the full restoration of property rights remain unresolved or only partially resolved. However, it should be noted that the difficulties experienced by former Croatian citizens of Serb origin in renewing their citizenship, and thus their voting rights, from their current place of residence arise largely from problems in the citizenship laws. This is an issue that should therefore be repaired through amendments to the citizenship laws, and not through electoral legislation.

10. Furthermore, the Constitutional Court ruled in 1999 that the Constitution allowed ethnic Croats living in Bosnia and Herzegovina and holding dual citizenship to vote for local government elections in Croatia. Whereas there may be some reasons to relax the residency requirements for *national* polls (especially with regard to the importance of minority-sensitive political decisions taken at this level), such arguments hardly exist for local and regional elections. Problems of transparency and access to judicial review, which already arise with

respect to external voters participating in national polls, as well as the crucial influence external voters may have on the result of an election if they are numerous, are compounded in the case of local elections by the fact that the representatives at this level will be deciding on matters that are of great importance to the local community but generally of little relevance to external voters.

11. As is described in the electoral reports, the specific voting arrangements for displaced persons were not covered in the Election Law. This led to certain organisational obstacles witnessed during the 2001 elections in some polling stations for displaced Serb voters.

12. In sum, both the application and the interpretation of the term “permanent residence in the area” in Article 2 need clarification in order to ensure that displaced voters can effectively exercise their right to vote and to avoid falsification of the results of local elections.

II The Electoral System and its Impact on Minorities

A Proportional System Using the d’Hondt Method of Allocating Seats

13. Article 9 of the Law reflects the principle of proportionality of seats for the majority and the various minorities living in the unit concerned (see also Articles 15, 44 and 132 of the Croatian Constitution).

14. It is to be welcomed that the term "minorities" is not defined, and especially that the minorities are not listed. However, here the same observation arises as that made by the Venice Commission in its Opinion on the Constitutional Law on the rights of National Minorities in Croatia (CDL-INF (2001) 14, p. 3), *viz.* that a list of minorities is still valid in the Preamble of the Constitution. As long as that Preamble has not been amended, the Law should state expressly that "minorities" in the sense of the Law is not restricted to those minorities that are listed in the Preamble of the Constitution.

15. The electoral system is laid down in Articles 9 and 11-24 of the Law. A system of proportional representation – which generally favours smaller groups and is therefore more advantageous to minorities – is provided for, with blocked lists in a single constituency at the level of each local and regional self-government unit. The number of seats in each unit is stipulated by the unit’s statute. A 5 % threshold is applied for all elections. The d’Hondt method was used for the calculation of seat distribution. The mayor is not elected by the population, but by the elected representatives of the local council. The mode of his or her indirect election is not regulated in the Law.

16. The 5 % threshold is quite high and tends to favour larger groupings, to the detriment of small political parties. It should be noted also that the lower the number of seats in a unit – a matter not regulated by law but left for the statutes of each unit, as described above –, the lower the probability that the (proportional) representation of minorities will be achieved. For instance, in elections to small local councils with only seven to ten seats, minor parties will need to obtain between eight and twelve percent of valid votes in order to have a representative elected. The *de facto* threshold may therefore in fact be higher than that laid down by law. Again, this acts to the detriment of small (often minority) political parties.

17. The Commission questions whether such a threshold – whether the 5 % legal threshold or a higher *de facto* one – would be in accordance with Article 15 of the Constitution and with the text and purpose of Article 21 of the draft Constitutional Law on the Rights of National Minorities in the Republic of Croatia, which aim at ensuring to national minorities on a proportional basis the right to political representation at state and local levels and participation in public affairs. (In that same draft Constitutional Law, in relation to the Croatian Parliament, it is provided under Article 20 that minorities forming less than 4% of the population shall together have at least 6 seats in the Parliament.)

18. Furthermore, certain ambiguities arise with regard to the concept of proportional representation used in the Law. This applies in particular to the comparison of Articles 9 and 61. Article 9, paragraph 1 states that "statutes of local and regional self-government units shall determine the number of members of representative bodies from amongst Croatian citizens, members of ethnic and national communities or minorities, in accordance with the *proportional* share of their members in the total population of the unit." But Article 61 also refers to the principle of "*adequate* representation" of the minority population in the compiling of electoral slates. This expression is also used in paragraph 2 of Article 9, with reference to the representation of Croatian people in areas where they are in the minority. The question therefore arises as to whether Article 61 and paragraph 2 of Article 9 may soften the criteria arising out of the first paragraph of Article 9, to the disadvantage of minorities.

19. It would be difficult to find an answer to this question in the Law itself, and no other law precisely regulates these questions. It is true that the Constitutional Law on the Rights of National Minorities is still only at the draft stage. However, extensive consultations on the draft of that law have been held and its highly framework-like character was criticised by *inter alia* the Venice Commission. In response to that objection came the explanation that the constitutional law was intended to provide a general framework to be filled in with other specific laws. That is how Article 13 of the Draft Constitutional Law should be understood when it states: "Members of national minorities shall, along with the general and equal right to vote for members of representative bodies of the local and regional self-government units, have the right to elect a certain number of members of representative bodies in proportion to the percentage they make up within the total population of the unit, in accordance with a special law and statute." Without a doubt, the law currently under analysis is just such a special law. It should therefore be filled with unequivocally precise and exhaustive content that leaves no room for doubt as to the scope of the principle of proportionality. Not every law can or should be a legislative framework.

20. Article 23 provides that: "All voters having permanent residence in the area of that unit who come to the polls, shall elect, on the basis of the slates of candidates, all members of the unit's representative body." This provision excludes any separate voter rolls or ethnic representatives elected by the voters of their group exclusively (and will therefore need to be amended if the Constitutional Law on the Rights of National Minorities is eventually adopted as it stands). According to the letter of the legal provision, the electoral system is thus limited to using direct and explicit strategies to protect minorities by reserving quotas at the level of candidacy. All parties proposing candidates are obliged to present mixed slates of candidates and the system thus includes a major incentive for inter-ethnic coalition building. However, without any clear provision about the ranking of candidates within the slates, the necessity of including representatives of minorities proportionally does not guarantee their election to the local and regional councils and does not ensure a proportional outcome.

21. Finally, it may be noted that it is not clear from the Law how the principle of proportionality of Article 9 and the resulting fixing of "proportional shares" may be reconciled with the freedom of choice of voters laid down in Article 10. Article 23, which regulates how the members of the representative bodies are elected, speaks of a "proportional electoral method", but that does not seem to relate to the composition of the constituency in a majority and minorities. If a voter declares that he or she belongs to a certain minority, and consequently his or her vote is taken into account in determining the "proportional share", does that mean that he or she may vote only for a candidate belonging to the same minority? And if several members of a certain minority do not wish to do so, given the fact that the voting is secret, how could that affect the "share" of that minority?

22. The issue is also still not sufficiently clarified by Article 21 of the draft Constitutional Law on the Rights of National Minorities in Croatia.

B Procedures for the Implementation of the Proportionality Principle

i) Composition of Electoral Slates

23. The system of proportional representation is sometimes criticised, in general terms, for encouraging the creation of parties along national or ethnic lines. Article 61 of the Law appears to try to compensate for this effect, at least to some extent, by providing that, “At the regular elections 2001, the proponents of slates shall, while compiling slates, acknowledge the principle of the adequate representation of the minority population, taking into account the local circumstances.”

24. This provision is nevertheless unsatisfactory, for two reasons. First, it does not require parties to place minority candidates in positions where they have a reasonable chance of being elected under the system of blocked lists laid down by the Law. Article 11 paragraph 3 mentions only the obligation to pay heed to the principle of gender equality, but is silent on ethnic proportionality. Even those parties that might be seriously committed in presenting such proportional slates would not be able to guarantee any proportionality in the outcome, as the overall composition of the council is the result of the winning candidates of different party lists (and not different ethnic lists).

25. Second, Article 61 of the Law, which is part of the interim and final provisions, only relates to the regular elections of 2001 and would, consequently, seem to be of no relevance any longer, unless the Article will be amended to refer to future elections. It does not contain any sanction for the situation in which the adequate representation provided for is not "adequately" reflected in the proposed slate (for the rather disturbing figures concerning minority representation on candidate lists, see the ODIHR Final Report at p. 17). Furthermore, Article 61 provides, in a rather vague fashion, for additional elections in the case that the elections held have not resulted in proportional representation of national minorities. This system of additional elections (“by-elections”) is discussed below.

26. On a more general level, the manner of list voting (blocked or open) has been the subject of much discussion in all countries adopting new election laws. Different arguments favour each of those alternatives, and neither oversteps the bounds of democratic standards. The Croatian election law has adopted the method of voting for the party leader and does not allow preferential voting within the limits of the slate. This solution undoubtedly strengthens

individual parties, especially the party leader, who has a decisive say in how the names of candidates are arranged on a slate. The order in which candidates are listed determines who gets elected; the electorate exerts a smaller influence on the concrete personal composition of a given representative body. However, for the reasons described above, this voting method presents the disadvantage that it may disrupt the principle of proportional representation of minorities. At the same time, though, it avoids possible strains due to internal campaigning such as nationality appeals between candidates on a given slate. It should be emphasised that legal solutions that are less likely to trigger conflicts should be promoted. Therefore, even if the possibility of voting for a given candidate would appear to constitute a better safeguard of minority rights, this is not always the rule. It therefore appears that the adopted solution may be the better one in Croatia's current situation.

ii) The System of By-Elections

27. A serious failing of the Law is that, while it provides, under Article 9, that the statutes of local and regional authorities shall determine the number of seats to be held by "Croatian citizens, members of ethnic and national communities or minorities, in accordance with the proportional share of their members in the total population of the unit", there is a remarkable absence of clear provisions governing how such a composition of the relevant bodies is actually to be achieved. As mentioned above, Article 61 provides for additional elections in cases where the elections held have not resulted in proportional representation of national minorities. It is not clarified, however, how such additional elections will be held and who may participate in them; only the minorities which are under-represented?

28. It is also not clear how the results of these additional elections will be combined with the results of the original elections. Will those elected candidates, who were listed last on their respective slates and who do not belong to the national minority concerned, have to resign to make room for candidates of the same slate who belong to the national minority concerned and who have been elected in the additional election? This consequence would amount to disrespect for the mandate given to the former by the voters, and would create a cause for ending a term of office before its expiration that is not listed in Article 7. On the other hand, an *ad hoc* increase of the membership of the elected body to provide seats for the additionally elected members, would also seem problematic and be in violation of the relevant statutes and regulations determining the size of the representative bodies (see also the ODIHR Final Report at p. 6).

29. Two solutions to address this kind of problem exist in the laws of other States. The first solution would remain within the overall logic of the Croatian local and regional electoral system by providing for "best loser seats" according to the Mauritius model. Thus, if the electoral outcome did not reflect the established quotas, the lowest-ranked winners according to the d'Hondt formula would be substituted by the best-placed minority candidates from the same lists. The second option would be to shift to a majoritarian electoral system with open party lists (and possibly multiple voting) where voters cast their votes for single candidates on the lists, and the seats would be distributed to the candidates obtaining the highest number of votes taking into account the agreed seat ratio between the different groups (Lebanese model). Other solutions may also be found, such as applying the system of double representation governing the elections at the State level, as provided for by the draft Constitutional Law on the Rights of National Minorities in Croatia, to the elections at the regional and local levels; but in any case, it is essential that clear provisions on this matter be included in the present Law.

iii) Use of the 2001 Census in Determining Minority Quotas

30. The Law additionally provides (Article 61, paragraph 2) for the by-elections discussed above to be held within 90 days after the results of the 2001 census are published in order to correct eventual under-representation of minorities. It remains to be seen to what extent such by-elections will ever be held, if the results of the census are published. In addition, the method of determining the size of the different groups is highly disputed, for instance in relation to the position of refugees, displaced persons and Croatian citizens living abroad, while for many persons belonging to a minority it may be problematic to identify themselves as such in a census, especially for Roma, out of fear of discrimination or intimidation (see the ODIHR Final Report at pp. 6-7, and the Opinion of the Advisory Committee § 20). Moreover, the census question on ethnicity, correctly reflecting the principle that no one can be obliged to declare themselves as belonging (or not belonging) to any given minority, was a voluntary question. (See the ODIHR Final Report, p. 7.) The proportional quotas will therefore reflect only the figures of those persons having declared themselves as belonging to such minorities.

31. Finally, the composition of the population, and therefore the numerical proportion of the different groups, will be subject to changes. It is unclear on what occasions and how frequently changes in numbers will be taken into account in allocating seats.

III Specific Provisions Having a High Impact on National Minorities

Article 11

32. It is not clear from this provision whether there is a minimum numerical requirement for the registration of a political party, while Article 12 requires a minimum number of signatures for the proposal of an independent slate.

33. There is no special provision for the proposal by minorities of slates for the election. This again raises the question of how the proportionality principle of Article 9 is to be put into effect. Do the minorities have to establish a separate political party or have to propose an independent slate as a group of voters to guarantee that candidates will be elected for the number of seats proportionally allocated to them?

34. There seems to be no sanction if the obligation under the third paragraph to take care of the principle of gender equality in composing the slates is not met. In fact, during the 2001 local elections the requirement was not implemented in several instances (CLRAE draft Report at p. 12; ODIHR Final Report at p. 18).

Article 12

35. There is no provision in Article 12, identical to that of Article 11, stipulating that the proponents of an independent slate shall be obliged to take care of the principle of gender equality. This difference does not seem to be justified.

36. Does the minimum numerical requirement of signatures also apply to minorities who wish to propose an independent slate, even if the total number of members of the minority concerned residing in the unit and entitled to vote is less than the required number of signatures?

Article 14

37. The time-limit of 12 days for forwarding proposed lists of candidates to the competent electoral commission, laid down in the first paragraph of Article 14, appears rather short given *inter alia* the requirement under Article 15 that lists contain the same number of candidates as the number of members of the representative body being elected.

38. The text of the second sentence of the second paragraph seems to start from the assumption that voters may only propose one independent slate, because if more slates are proposed, the prescribed name has no distinguishing meaning. However, there is nothing in the text of Articles 11 and 12 to suggest that voters cannot propose more slates, provided that for each slate the minimum numerical requirement is fulfilled. This has to be clarified.

Article 15

39. The requirement that the ethnicity of candidates is mentioned would seem to serve a legitimate aim only if that requirement relates in any way to the proportionality principle laid down in Article 9 (see above, part I.B). If for the seats proportionally allocated to the majority and minorities in the unit, candidates are elected on the basis of separate slates, there would seem to be no justification for requiring that candidates reveal their ethnicity if they do not figure on a specific minority slate. If, on the contrary, the "proportional shares" are brought about by counting the candidates of a certain ethnicity who have been elected, it is not clear how it may be guaranteed beforehand that the "proportional share" will be achieved, while it is of course not possible to change the results of the elections in order to give effect to proportionality without holding additional elections. (See, however, the remarks at the end of the observations in section II.B.*ii)* above.)

40. The decision of the Constitutional Court that, if a list of candidates is no longer complete due to events other than the decease of a candidate, the list is no longer valid, could amount to a frustration of the right of proportional political participation. This solution is obviously disadvantageous for every political grouping. In the case of minorities, however, it has an especially negative dimension since it can bring about the elimination of an entire minority slate, thereby completely violating the principle of proportional representation defined in Article 9. Imprecisely formulated provisions of the law therefore lead to internally contradictory principles within the framework of a single law. The Law should be amended to remedy this undesirable effect, for instance by allowing lists of candidates to contain more names than the number of seats available or by providing where necessary for a procedure to add names to a slate that would avoid the elimination of the entire slate.

Article 17

41. The provision does not take into account the inclusion of independent slates by their name.

Articles 18 and 19

42. The question of access to the media is addressed only very briefly (Article 19). It should either be developed in the present law or treated in a more substantial manner in other pieces of legislation. Is there a guarantee of access to the national and local media? And if so, does that mean access to the public media only, or also to the private media? What tools of expression are covered by the notion of "local public information outlets"? Is the guarantee of access "without obstacles" not too absolute? One could think of necessary restrictions as to time and place, and of certain measures necessary to protect public order and to protect the rights and interests of others. Are all forms of access free of charge? What is meant by "under equal conditions"? Is that formal equality or substantive equality proportional to, for instance, the membership of the political party or coalition, or the number of signatures of independent slates? And finally, what sanctions are involved, if access and coverage are not given in conformity with the requirements?

Article 21

43. An exceptionally important problem, to which the proper importance is not always attached, especially in what are known as the new democracies, is the issue of compensating campaign costs. The basic question is whether the state should finance political parties or whether they should be left entirely to their own resources. Various arguments favour one or the other alternative. The law under analysis has opted for a solution whereby the state provides compensation for elections. However, Article 21, which deals with this problem, is exceedingly general. Political parties and leaders of independent slates that gain a minimum of one member in a representative body at the elections shall be entitled to the compensation of electoral campaign expenses. But the details have been left to the government's discretion. This is unsatisfactory, since, regardless of which system is chosen, it must in any case be precisely defined in the election law, or possibly in the law on political parties. The opportunity to regulate this matter in the present law has not been tapped, and that constitutes a major shortcoming of the law. Leaving the matter entirely up to the government without any clearly legislated rules always spawns the threat of preferential treatment of certain parties or of corruption. Historical examples of such phenomena are not in short supply. Hence, this is one of the more serious defects of the present law.

44. Particular issues that require clarification include: the criteria for determining the amount of compensation; the questions whether the number of candidates elected or the number of members of the political party are relevant factors; whether the fact that a political party will have members who pay a contribution, which usually will not be the case for an independent slate, will be taken into account; and whether there is room for "positive discrimination" to enable presumably minorities to participate effectively in the elections.

45. Provisions are lacking concerning the use of the funds provided and concerning reporting and auditing (see, however, Article 6, third paragraph, of the Constitution).

46. Provisions are also lacking concerning other sources of financial support and their limitations, and concerning the disclosure of sources (see, however, Article 6, third paragraph, of the Constitution). Private support for political parties may put national minorities in a disadvantageous position. Will financial support by the kin state of a national minority be allowed? Who will supervise the sources and amounts of financial support and their use, and which sanctions are provided for any misuse?

Article 26

47. Since the State Electoral Commission also supervises the work of regional and local electoral commissions, its composition is also relevant for the elections of members of the representative bodies of regional and local units. Paragraph four provides for the extended composition of the State Electoral Commission for the representation of political parties in the Commission, but not for representation of those minorities whose voters are not affiliated with a political party (nor of other voters who support independent slates). Furthermore, a qualified majority should be required for the decisions of the electoral commissions in order to avoid the political majority imposing its views too easily.

Article 27

48. For the composition of the regional and local electoral commissions the same holds *a fortiori*: there is no provision for the representation of those minorities whose voters are not affiliated with a political party (nor of other voters who support independent slates). Since the electoral commissions determine the voting results of the respective units (Articles 46-49), representation on these commissions is instrumental in supervising that equal political representation is ensured.

49. The provision according to which the chairpersons of electoral commissions of a unit shall be graduate lawyers is praiseworthy, and could be extended to their deputies (cf. Article 32, paragraph 4, where a similar requirement already applies to both the chair and the deputy chair of a voting committee). In addition, there should be an express provision that the chairs of the electoral commissions and their deputies shall be independent and impartial persons.

Articles 28-32

50. Since the electoral commissions appoint the members of the voting committees and since in the composition of the former no representation of minorities is guaranteed (see comments on Articles 26 and 27), there is also no guarantee that minorities are proportionally represented in the voting committees. As these committees have to ensure the regularity and secrecy of voting (Article 32, first paragraph), decide on whether or not a voter is allowed to vote (Article 41), visit voters at home who are not able to come to the polling station (Article 42, second paragraph), count the votes (Article 43, second paragraph) and establish the voting results (Article 44), such proportional representation is instrumental to the protection of the voting rights of minorities. The possibility of appointing monitors, provided for in Article 34, does not offer full compensation for this lack of proportional representation, given the difference in functions and powers between the voting committees and the monitors.

Article 34

51. There is no special reference to national minorities as groups which shall have the right to appoint monitors, although national minorities are not necessarily covered by the category of "political parties and voters who proposed the slates" nor by the category of "non-governmental

associations". The right of minorities to appoint observers for the elections in those units where their members participate in the elections and are candidates, is a very effective tool to supervise the implementation of their equal right to vote and to proportional political representation.

Article 37

52. The wording of the second paragraph confirms that one can only vote for a whole slate and not give one's preferential vote to a candidate who is not number one on the list of the slate. The effects on national minorities of this system of blocked lists, as well as its effects on the implementation of proportional political representation, are discussed above, at II.A and II.B.

Article 49

53. Among the details to be announced, the ethnicity of the candidates elected is not mentioned. This contrasts with the requirement under Article 15 that the ethnicity of candidates be stated on the proposals of slates of candidates and again indicates that the Law does not seem to provide express guarantees for ensuring that there is in fact proportional political representation of minorities at regional and local level. This makes the conformity of Articles 9 and 15 with the Framework Convention for the Protection of National Minorities still more doubtful.

Article 52

54. If a certain minority does not participate in the elections as a separate political party or with an independent slate, its right to raise objections with the Constitutional Court concerning irregularities in the candidacy procedure would seem to be insufficiently guaranteed. Such a right to raise objections with the Constitutional Court is, however, of vital importance to ensure proportional political representation. In fact, the provisions of this law on *locus standi* with respect to lodging objections with the Constitutional Court are very restrictive in general.

Articles 53-56

55. If objections to the electoral commissions may also only be submitted by political parties and coalitions, or by leaders of independent slates, the same observation holds that the possibility for minorities to have their right to proportional political participation ensured, is insufficiently guaranteed.

56. The third paragraph of Article 56 provides that an appeal to the Constitutional Court shall be submitted through the competent electoral commission. Since the appeal will be directed against the decision of that very electoral commission, this provision could negatively affect the free access to the Constitutional Court, also for representatives of minorities.

57. ODIHR reports, however, that during the 2001 local elections the appeals process was properly conducted with adequate recourse to an appeal and that the appeals were duly considered (Final Report at p. 9).

Article 61

58. See the observations made in the context of the comments on proportional representation in section II.B.*ii)*.

59. The third paragraph of Article 61 provides for the precedence of the statutes of regional and local units over the present Law in the matter of participation of national minority members in the representative bodies. This precedence clause would seem to be of too general a character. If the statutory provision concerned provides for such participation but does not guarantee a "proportional share" in the sense of Article 9, the latter must have precedence in order to ensure the right of proportional political participation. Moreover, the relation between the statutes and the present Law may also raise a constitutional issue which should ultimately be settled by the Constitutional Court.

IV Other Provisions

Article 3

60. The provision in the fourth paragraph that the term of office of members of representative bodies shall last until the announcement of the decision to call elections or to dissolve a representative body, may have as a result that a rather long period of time lapses between the ending of the term of office of the current members and the official announcement of the results of the new elections, during which period no representative body would be in function. Consideration should be given to either ensuring that the new elections will follow shortly after they have been called or shortly after the dissolution of the representative body, or to inserting a transitional provision to the effect that the term of office of the members will continue until the moment the outcome of the elections is officially announced. The fourth paragraph also creates the impression that the Government of Croatia may at its discretion determine the duration of the term of office by calling new elections. However, this is clarified by the provision in the following article that “regular elections shall be held on the third Sunday of the month of May, every four years”.

Article 5

61. In the second paragraph, the President of the Republic is not mentioned as a function that is incompatible with the membership of a representative body. This reference should be added.

Article 7

62. After the third dash, there is a reference to a court verdict sentencing the member to a unconditional prison sentence of more than six months, the words "on the day of the coming into effect of the court verdict". If the court verdict is open to appeal, does the term of office indeed end on the day of the coming into effect of the verdict, or on the day on which the period for appeal has been lapsed without an appeal having been lodged, or, if an appeal had been lodged, on the day the final judgement is pronounced? This needs to be clarified.

Article 8

63. This provision needs to be rephrased for the sake of clarity. The first paragraph creates the impression that each member of a representative body has a specific deputy, while it becomes clear from the second and third paragraph that as a rule one and the same non-elected candidate will figure as a possible substitute for the first member out of a group of several members who is suspended or whose term of office ceases before the expiration of his or her term of office. An alternative may be considered to put the second and third paragraph at the beginning and to add a paragraph concerning the replacement of those members who have not been elected on a party slate or coalition slate.

64. In any case, these provisions should be modified in order to make clear that the candidate that replaces another candidate whose term of office has been suspended or has ceased is the first non-elected candidate on the list and that the party cannot choose a replacement freely on the list. Otherwise, the order of the list would lose its meaning, since it would be possible for a party, when a candidate at the top of the list resigns, to replace him or her by someone from the bottom of the list.

Article 50

65. The important question of the financing of the elections (Article 50) is addressed only very briefly. This should either be developed in the present law or treated in a more substantial manner in other pieces of legislation.

V General Remarks

66. The aim of the present law does not appear to be to deal with every question arising in the field of local elections. The Commission therefore considers it acceptable that the law does not deal with issues that may be dealt with in other laws, such as the registration of voters or certain sanctions to be imposed for failures to respect this law. However, it would be advisable for explicit references to be made to such laws at the relevant points in the present law. Care should also be taken to ensure that concepts referred to across a number of laws do not become incoherent through the simple fact that the relevant laws were adopted at different times and in very different political and legal circumstances.

67. In addition, the date on which this law went into effect, very close to election day, has raised numerous doubts in terms of guaranteeing electoral rights, especially those of persons belonging to different nationalities. The issue of the proper *vacatio legis* is one of the key principles of a law-abiding state. Its significance has been emphasised by both scholarly literature and case-law. It should be noted that an election law is a special kind of law which requires a longer *vacatio legis* owing to the very nature of electoral procedures. Too brief a period between the date on which the law goes into effect and the date of voting does not provide sufficient guarantees for the fair preparation and holding of elections. This is especially important given the complex nationality situation in Croatia, unresolved problems of the citizenship law and a lack of clarity as to which individual categories of people can take part in the elections and in which conditions. Careful preparations are thus necessary and, above all, these require time. Otherwise a basis of manipulation is created with regard to

smaller or less well organised groups. This is a formal aspect of the law that does not pertain to its content, but it has an adverse effect on the possibility of guaranteeing fair elections. (See for instance the ODIHR Final Report, p. 3-5.)

68. Finally, it should be noted that a coherent policy of fair representation of national minorities should also tackle the question of proportional access to public office at the local level, which necessarily goes beyond legislative institutions. This is an aspect that cannot be dealt with in an electoral law but should be borne in mind for future developments in the law.

Conclusions

69. From the above analysis it may be concluded that the Law on the Election of Members of the Representative Bodies of Local and Regional Self-Government Units is unclear on several points. A number of ambiguities arise from insufficiently clear or precise provisions, which should be amended. Reference is made here in particular to the points raised above in sections III and IV. Furthermore, as the law does not deal with every question arising in the field of local elections, the problems arising will in some cases require amendments also to other laws. The fair representation of national minorities at the local level may require amendments in particular also to the Law on Citizenship.

70. Care should also be taken to ensure that the relationship between the concepts contained in this law and in other laws that are already in force, but that were drafted in very different political and legal circumstances, does not become incoherent. Such incoherence would not improve the guarantees of electoral rights.

71. The absence of regulations with respect to the media and financing of elections are especially important lacunae. The present law would seem, particularly in these respects, to constitute a certain framework which must be imbued with precise substance before the next election takes place. This must be done sufficiently in advance of the next elections in order to guarantee the fair preparation and holding of the elections.

72. There are moreover a number of serious flaws which mean that the right of minorities to proportional political representation at regional and local level, provided for in Article 21 of the draft Constitutional Law on the Rights of National Minorities in the Republic of Croatia, finds insufficient procedural and material guarantees in the Law under consideration. In particular:

- the application of a double standard with respect to the residency requirement for the right to vote – non-Croatian citizens residing in Croatia cannot vote in these elections, whereas Croatian citizens living abroad are entitled to vote – does not appear justified in the context of local and regional elections, does not reflect the general European approach to participation in local and regional elections, and has serious consequences in particular for Serb refugees;

- whereas the principle of proportional political representation of minorities is enunciated in the Law, the means of ensuring its implementation are not clearly laid down;

- the proportional system using blocked lists means that candidates belonging to national minorities will only be elected if they are placed sufficiently high on the slate on which they are running, and thus, even if the slates themselves reflect the proportional

composition of a given electoral unit, there is no guarantee that this will lead to proportional representation on the relevant local or regional body;

- Article 61 of the Law, which provides that additional elections ("by-elections") shall be held within 90 days of the publication of the 2001 census results if proportional representation of minorities has not been achieved, does not regulate these by-elections any further, provides no means of enforcement and is in any case an interim provision applicable only to the 2001 local and regional elections;

- the legal threshold of 5% required for a list to have a candidate elected is quite high and may exclude national minorities from being represented; and, if the council is small, the *de facto* threshold may indeed be higher still;

- the requirement that candidates declare their ethnicity (Article 15) does not appear, in combination with the other provisions of the Law, to enhance the possibilities of proportional representation of national minorities as laid down under Article 9, and therefore does not seem to serve a legitimate aim.

73. These factors have a significant impact on minorities. It cannot be said *prima facie* that the resulting limitations of the principle of proportional representation of parties as well as of minorities have a legitimate purpose and are proportional to the aim pursued, also in an international law perspective. It is especially important that these elements be amended and clarified before the next elections, and sufficiently in advance of them to ensure that the preparation and holding of the elections is fair.

74. Finally, these factors highlight the importance of adopting the Constitutional Law on the Rights of National Minorities. The adoption of this text – which has already been delayed by several years – is vital to ensure that a clear framework for the protection of national minorities is laid down, within which the provisions of the present Law will fill in the details regarding the participation