THE CONSTITUTIONAL COURT OF THE REPUBLIC OF CROATIA
Nos.: U-I-3597/2010
U-I-3847/2010
U-I- 692/2011
U-I- 898/2011
U-I- 994/2011
Zagreb, 29 July 2011

The Constitutional Court of the Republic of Croatia, composed of Jasna Omejec, President of the Court, and Judges Mato Arlović, Marko Babić, Snježana Bagić, Slavica Banić, Mario Jelušić, Ivan Matija, Antun Palarić, Aldo Radolović, Duška Šarin and Miroslav Šeparović, deciding on proposals to institute proceedings to review the conformity of a law with the Constitution of the Republic of Croatia (*Narodne novine* nos. 56/90, 135/97, 113/00, 28/01, 76/10), at its session held on 29 July 2011 rendered the following

D E C I S I O N

I. Proceedings have been instituted to review conformity with the Constitution and Article 1 of the Constitutional Act on Amendments to the Constitutional Act on the Rights of National Minorities (*Narodne novine*, no. 80/10) is hereby repealed.

II. Until the issues in the Article 1 repealed in point I of this pronouncement are regulated in accordance with the constitutional requirements substantiated in this decision, the rules in Article 19 of the Constitutional Act on the Rights of National Minorities (*Narodne novine*, nos. 155/02, 47/10 – decision and ruling of the Constitutional Court of the Republic of Croatia no.: U-I-1029/2007 and others of 7 April 2010) shall be applied.

III. This decision shall be published in *Narodne novine*.

S t a t e m e n t o f r e a s o n s

I. THE PROCEEDINGS BEFORE THE CONSTITUTIONAL COURT

1. The following submitted proposals for the Constitutional Court to institute proceedings to review conformity with the Constitution of Article 1 para. 2 sub-paras. 2 and 3 of the Constitutional Act on the Constitutional (Amendments) Act on the Rights of National Minorities (*Ustavni zakon o izmjenama i dopunama Ustavnog*

zakona o pravima nacionalnih manjina, *Narodne novine*, no. 80/10; hereinafter: C(A)A RNM):

- Serbian Democratic Forum (SDF), represented by Veljko Đakula, president of the Administrative Committee (case number: U-I-3597/2010),

- Socialist Party of Croatia (SPC), represented by Milovan Bojčetić, president (case number: U-I-3847/2010);

- Đuro Kalanja (case number: U-I-692/2011);

- Croatian Helsinki Committee (CHC) seated in Zagreb, represented by Ivan Zvonimir Čičak, president (case number: U-I-898/2011);

- GONG, association seated in Zagreb, represented by Sandra Pernar, executive director (case number: U-I-994/2011).

The impugned Article 1 para. 2 sub-paras. 2 and 3 C(A)A RNM changed paragraphs 2, 3 and 4 of Article 19 of the Constitutional Act on the Rights of National Minorities (*Ustavni zakon o pravima nacionalnih manjina*, *Narodne novine* no. 155/02, 47/10 – decision and ruling of the Constitutional Court of the Republic of Croatia no.: U-I-1029/2007 and others of 7 April 2010; hereinafter: CA RNM). In the CA RNM the impugned provisions are in Article 19 paras 2 and 3.

In this decision the impugned parts of Article 1 para. 2 sub-paras 2 and 3 C(A)A RNM shall in short be termed as "Article 1 para. 2" and "Article 1 para. 3" C(A)A RNM respectively.

2. The Serbian Democratic Forum, represented by Veljko Đakula, president of the Administrative Committee, and the Socialist Party of Croatia – SPC, represented by Milovan Bojčetić, president, also submitted proposals for the Constitutional Court to institute proceedings to review the conformity with the Constitution of Article 4 para. 1 sub-paras 3 and 4 C(A)A RNM (Article 33 paras 7 and 8 CA RNM). These cases of constitutional review are filed under the numbers: U-I-3786/2010 and U-I-3553/2011 respectively.

3. The proponents the Serbian Democratic Forum, Đuro Kalanja, Croatian Helsinki Committee for Human Rights and GONG also submitted proposals for the Constitutional Court to institute proceedings to review the conformity with the Constitution of several provisions of the Election of Representatives to the Croatian Parliament (Amendments) Act (*Zakon o izmjenama i dopunama Zakona o izborima zastupnika u Hrvatski sabor*, *Narodne novine*, no. 145/10; hereinafter: Parliamentary Elections /Amendments/ Act). These cases of constitutional review are filed under the numbers: U-I-452/2011, U-I-693/2011, U-I-746/2011 and U-I-993/2011 respectively.

4. During consideration of the cases in this proceeding the Constitutional Court decided to render one decision about the proponents' proposals.

5. On the grounds of Article 42 para. 1 of the Constitutional Act on the Constitutional Court of the Republic of Croatia (*Narodne novine*, nos. 99/99, 29/02

and 49/02 – consolidated wording; hereinafter: the Constitutional Act), the Constitutional Court requested and received the opinion of the Government of the Republic of Croatia about the proposals.

6. The Constitutional Court requested and received in writing expert opinions on the proposals from the heads of the Constitutional Law Departments of the Law Faculties of the Universities in Osijek (Professor Zvonimir Lauc, LL D), Split (Professor Arsen Bačić, LL D), Rijeka (Professor Sanja Barić, LL D) and Zagreb (Professor Branko Smerdel, LL D). These expert opinions are deemed a composite part of this constitutional court file.

7. On the grounds of Article 49 para. 1 of the Constitutional Act, at its session on 1 March 2010 the Constitutional Court decided to hold a consultative discussion in connection with the above proposals. This discussion was held on 11 April 2011 in the discussion room of the Constitutional Court in Zagreb. The participants were the proponents, i.e. their representatives, representatives of the Croatian Parliament and of the Government of the Republic of Croatia, including the Minister of Justice and the Minister of Public Administration, and representatives of the academic community. The hearing was sound recorded. It was directly followed by registered journalists, and the electronic media were permitted to video record it in its entirety.

8. During the proceedings the Constitutional Court also held expert discussions with members of the Croatian Constitutional Law Association. These discussions were held on 2 June 2011 in the discussion room of the Constitutional Court in Zagreb. Some of the Association members (Professor Robert Podolnjak and Đorđe Gardašević, LL D) later delivered their speeches and discussions to the Constitutional Court in writing. These papers are deemed a composite part of this constitutional court file.

1) The Jurisdiction of the Constitutional Court to Review the Constitutional Act on the Constitutional (Amendments) Act on the Rights of National Minorities

9. The CA RNM is by the force of Article 15 para. 2 of the Constitution an "organic act that is passed by a two-thirds majority of the votes of all the representatives".

Despite their names, however, neither the CA RNM nor its amendments have the force of the Constitution because they are not passed and amended according to the proceedings for passing and amending the Constitution. The fact that some acts are called constitutional "does not change the legal nature of these acts, does not make them legally different from what they are under the Constitution and according to their content, and the Constitutional Court does not review them according to their name but according to their legal nature" (decision of the Constitutional Court no.: U-I-, 774/2000 of 20 December 2000, *Narodne novine*, no. 1/00).

Accordingly, the Constitutional Court has the jurisdiction to review the conformity with the Constitution of the CA RNM, including also all its amendments.

II. THE PROCEEDINGS OF PASSING THE CONSTITUTIONAL ACT ON THE CONSTITUTIONAL (AMENDMENTS) ACT ON THE RIGHTS OF NATIONAL MINORITIES

10. The Government of the Republic of Croatia, in act class: 016-01/10-01/01, entry no.: 5030104-10-1 of 15 June 2010, submitted to the Speaker of the Croatian Parliament the proposal of the Constitutional (Amendments) Act on the Rights of National Minorities with the Final Bill (P.Z. no. 569) (hereinafter: C(A)A RNM Bill).

The Government of the Republic of Croatia referred to Article 15 para. 3 of the Constitution as the constitutional ground for enacting the C(A)A RNM. It provides that "besides the general electoral right, the special right of the members of national minorities to elect their representatives to the Croatian Parliament may be provided by law".

The C(A)A RNM Bill also contained the Government's proposal for that act to be passed in emergency procedure. It gave the following reasons for the need for emergency procedure:

> "The proponent deems that the conditions provided for in Article 159 of the Standing Orders of the Croatian Parliament to enact the Constitutional Act in emergency procedure have been met.
>
> The need to additionally regulate the equality and the protection of national minorities, and the rights and freedoms of the members of national minorities, in accordance with the provisions of the Constitution of the Republic of Croatia and the provisions of international agreements that regulate the protection of particular freedoms and rights of national minorities and their members are a justified state reason for passing this Constitutional Act in emergency procedure."

11. On the grounds of the C(A)A RNM Bill submitted, the agenda of the 18th sitting of the Croatian Parliament was on 16 June 2010 supplemented by a new item entitled "Proposal for the Constitutional Act on Amendments to the Constitutional Act on the Rights of National Minorities with the Final Bill, emergency procedure, first and second reading, P.Z. no. 569". On the same day the Parliament accepted the application of emergency procedure (unanimously, 131 votes "for").

11.1. The Committee for the Constitution, Standing Orders and Political System of the Croatian Parliament at its 53rd session held on 16 June 2010 discussed the C(A)A RNM Bill on the grounds of its authority as the competent working body in Article 57 of the Standing Orders of the Croatian Parliament (*Narodne novine*, nos. 71/00, 129/00, 117/01, 6/02 – consolidated wording, 41/02, 91/03, 58/04, 69/07, 39/08 and 86/08). After the discussion the Committee proposed to the Croatian Parliament with a majority vote (six votes "for" and five "withheld") to enact the C(A)A RNM in the text in which the Croatian Government had proposed it.

11.2. The Committee on Human and National Minority Rights of the Croatian Parliament at its 36th session held on 16 June 2010 examined the C(A)A RNM Bill on the grounds of its authority as the competent working body in Article 71 of the Standing Orders of the Croatian Parliament. After the discussion the Committee unanimously proposed to the Croatian Parliament to enact the C(A)A RNM with the

amendments the Committee had proposed (see point 14 of the reasons of this decision).

11.3. The parliamentary discussion of the C(A)A RNM Bill was concluded on 16 June 2010. In accordance with Article 227 of the Standing Orders of the Croatian Parliament, a two-thirds majority vote of all the representatives to the Parliament was necessary to enact the C(A)A RNM, that is at least 102 votes.

On 16 June 2010 the Croatian Parliament enacted the C(A)A RNM together with the accepted amendments with a two-thirds majority vote of all the members, (129 votes "for", three "against" and four "withheld"). The President of the Republic of Croatia promulgated it on 18 June 2010. It was published in *Narodne novine*, no. 80 of 28 June 2010, and it entered into force on 6 July 2010, the eighth day after its publication.

12. The C(A)A RNM amended Article 19, Article 20 para. 7 and Article 22 paras 2 and 3 CA RNM, and supplemented Article 33 CA RNM by the new paragraphs 5 to 8.

12.1. The proponents dispute the conformity with the Constitution of Article 1 paras. 2 and 3 C(A)A RNM, the legislative solutions that amended Article 19 paras. 2, 3 and 4 CA RNM.

III. THE CONTENT OF ARTICLE 1 C(A)A RNM AND THE REASONS FOR ENACTING IT

1) The proposal of Article 1 C(A)A RNM submitted by the Government of the Republic of Croatia

13. The Croatian Government, as the sponsor of the C(A)A RNM Bill, proposed the amendment of Article 19 CA RNM in the following wording:

> "Article 1
>
> In the Constitutional Act on the Rights of National Minorities (*Narodne novine*, nos. 155/2002 and 47/2010), Article 19 shall be amended and shall read:
>
> '(1) The Republic of Croatia guarantees the members of national minorities the right to representation in the Croatian Parliament.
>
> (2) The national minorities which on the day when this Constitutional Act enters into force participate in the population of the Republic of Croatia with more than 1.5% shall be guaranteed at least three seats in the Croatian Parliament which exercise their representation on the grounds of the general right to vote, in accordance with the law that regulates the election of representatives to the Croatian Parliament.
>
> (3) National minorities which participate in the population of the Republic of Croatia with less than 1.5%, in addition to the general right to vote, have the right to elect five representatives who are national minority members in special constituencies on the grounds of special voting rights, in accordance with the law that regulates the election of representatives to the Croatian Parliament."

13.1. In the part of the C(A)A RNM Bill entitled "II. Assessment of Conditions, the Basic Issues to be Regulated by the Constitutional Act and the Effects of the Enactment of the Constitutional Act", the Croatian Government gave the following reasons for proposing the amendment to the previous Article 19 CA RNM:

"The amendments to Article 19 of the Constitutional Act are introducing two models of positive discrimination for national minorities in the guarantee of their right to representation in the Croatian Parliament, which differ depending on whether they participate in the total population of the Republic of Croatia with more or less than 1.5%.

The members of the national minorities that participate in the population of the Republic of Croatia with more than 1.5% on the day when this Constitutional Act enters into force realise their right to representation in the Croatian Parliament with at least three and possibly more representatives, through the general right to vote.

In view of the fact that the members of national minorities that participate in the total population of the Republic of Croatia with less than 1.5% may not achieve their right to representation in the Croatian Parliament through the general right to vote (only), they are under the provisions of Article 15 para. 3 of the Constitution of the Republic of Croatia, under the new provision of Article 19 para. 3, granted special voting rights as well.

Introducing the above models of positive discrimination is an important move in the further development of the democratic system of the Republic of Croatia and puts into effect the positive measures proclaimed in Article 3 para. 1 of the Constitutional Act on the level of principle.

The newly introduced models of positive discrimination for national minorities also follow the guideline in Article 4 para. 6 of the Constitutional Act under which that Constitutional Act or a separate law may institute the realisation of certain rights and freedoms depending on the size of national minorities in the Republic of Croatia."

2) Amendments to the proposal of Article 1 C(A)A RNM

14. During its discussion of the C(A)A RNM Bill, the Committee for Human and National Minority Rights of the Croatian Parliament proposed two amendments to Article 1 of the Final C(A)A RNM Bill. According to the "Report of the Committee for Human and Minority Rights on the Proposal of the Constitutional Act on Amendments to the Constitutional Act on the Rights of National Minorities, with the Final Bill, P. Z. no. 569", they read as follows:

" 1st AMENDMENT

In Article 1 of the Final Bill (FB) of the act amending Article 19 of the Constitutional Act, in paragraph 2 in front of the words 'in the Croatian Parliament' shall be added the words: 'for members of that national minority', and after the words 'general right to vote' shall be added the words: 'on the party lists of that minority or lists that are proposed by the voters of that minority'.

Explanation:

The amendment adds precision to the proposed formulation of paragraph 2 of Article 19 of the Constitutional Act.

2nd AMENDMENT

In Article 1 FB that amends Article 19 of the Constitutional Act in paragraph 3 after the words 'in special constituencies' shall be added the words: ', which cannot reduce the acquired rights of national minorities.'

Explanation:

By supplementing paragraph 3 part of the wording that now exists in Article 19 (para. 2) of the Constitutional Act is returned, which guarantees the acquired rights of national minorities."

The Croatian Government accepted the above amendments, so they became part of the C(A)A RNM.

3) The integral text of the impugned Article 1 C(A)A RNM

15. The wording of Article 1 C(A)A RNM that is in force today, and whose compliance with the Constitution of paragraphs 2 and 3 the proponents in this proceeding before the Constitutional Court challenge, reads as follows:

"Article 1

In the Constitutional Act on the Rights of National Minorities (*Narodne novine*, nos. 155/2002 and 47/2010), Article 19 shall be amended and shall read:

'(1) The Republic of Croatia guarantees the members of national minorities the right to representation in the Croatian Parliament.

(2) The national minorities which on the day when this Constitutional Act enters into force participate in the population of the Republic of Croatia with more than 1.5% shall be guaranteed at least three seats in the Croatian Parliament for members of that national minority who exercise their representation on the grounds of the general right to vote on the party lists of that minority or lists that are proposed by the voters of that minority, in accordance with the law that regulates the election of representatives to the Croatian Parliament

(3) National minorities which participate in the population of the Republic of Croatia with less than 1.5%, in addition to the general right to vote have the right to elect five representatives who are national minority members in special constituencies on the grounds of special voting rights, which cannot reduce the acquired rights of national minorities, in accordance with the law that regulates the election of representatives to the Croatian Parliament."

IV. THE OBJECTIONS OF THE PROPONENTS

16. The Serbian Democratic Forum (SDF) and the Socialist Party of Croatia (SPC) dispute the conformity with the Constitution of Article 1 paras. 2 and 3 C(A)A RNM because they consider that these provisions bring the Serb national minority into an unequal position in relation to the other national minorities in the Republic of Croatia.

In their opinion, Article 1 C(A)A RNM has provided all the national minorities in the Republic of Croatia, except the Serb minority, with special voting rights in addition to general voting rights (i.e. "two votes" at elections), and therefore the Serb national minority has been placed in an unequal position in relation to the others.

In the proponents' view, Article 1 paras. 2 and 3 C(A)A RNM are not in conformity with Article 15 paras. 1 and 3 of the Constitution.

17. The proponent Đuro Kalanja considers that Article 1 para. 2 C(A)A RNM is in breach of the Constitution. He maintains that the "provisions of the above acts are not properly or legally grounded on the following provisions: of the Historical Foundations paragraphs 2 and 3 of Article 3, of Article 5 paragraphs 1 and 2, Article 15 paragraphs 1, 2 and 3 of the Constitution of the Republic of Croatia and of Article 1 paragraph 1 indents 7, 9 and 10, Article 2, Article 3 paragraph 1, Article 4 paragraphs 2 and 4, Article 7 paragraph 8 and Article 8 of the Constitutional Act on National Minorities". He gives the following reasons to substantiate his claim:

"4. The Republic of Croatia has 4,437,460 inhabitants according to the 2001 census:

- Croats 3,977,171 persons
- other national minorities (21) 129,752 persons
- Serb national minority 201,631 persons

On the grounds of the Election of Representatives to the Croatian Parliament Act representatives are elected as follows:

- Croats 140 representatives
- other national minorities 5 representatives
- Serb national minority 3 representatives

The two indicators shown above give the result for the representation of the Serb national minority in the Parliament of the Republic of Croatia:

- Croats 3,977,171:140 = 28,408 persons
- other national minorities 129,752: 5 = 25,950 persons
- Serb national minority 20,1631: 3 = 67,210 persons

The above indicators reflect the fact that the Serb national minority is represented as follows :

- 28,408:67,210=0.4227x100 = 42% in relation to Croats
- 25,950:67,210=0,3861x100 = 39% in relation to the other national minorities in the Republic of Croatia.

5. On the grounds of the indicators in point 4 of this proposal, I propose that the Constitutional Court of the Republic of Croatia, in accordance with Article 38 para. 1 of the Constitutional Act on the Constitutional Court of the Republic of Croatia, institutes proceedings to review the conformity of the provisions of Article 1 para. 1 of the Constitutional Act on Amendments to the Constitutional Act on the Rights of the Members of National Minorities and Article 5 paras. 2 and 3 of the Election of Representatives to the Croatian Parliament (Amendment) Act."

18. The Croatian Helsinki Committee for Human Rights (HHO) deems that paragraphs 2 and 3 of Article 1 C(A)A RNM (or paragraphs 2 and 3 of Article 19 CA RNM, as the proponent states) are not in accordance with Article 3, Article 14 para. 2, Article 15 paras. 1 and 3 and Article 45 para. 1 of the Constitution for the following reasons:

"1. National minorities that participate in the population of the Republic of Croatia with less than 1.5% (Hungarian, Italian, Czech, Slovakian, Austrian, Bulgarian, German, Polish, Roma, Rumanian, Ruthenian, Russian, Turkish, Ukrainian, Vlach, Jewish, Albanian, Bosniak, Montenegrin, Macedonian and Slovenian) elect five members of national minorities in a special constituency that covers the entire area of the Republic of Croatia.

2. The voters of national minorities that participate in the population of the Republic of Croatia with less than 1.5% (Hungarian, Italian, Czech, Slovakian, Austrian, Bulgarian, German, Polish, Roma, Rumanian, Ruthenian, Russian, Turkish, Ukrainian, Vlach, Jewish, Albanian, Bosniak, Montenegrin, Macedonian and Slovenian), besides their minority representatives whom they elect on the grounds of their special voting rights, also elect representatives from lists on the grounds of their general voting rights, which means that they have dual voting rights.

3. National minorities that participate in the population of the Republic of Croatia with more than 1.5% do not have dual voting rights. For these minorities the election of minority representatives on the grounds of special (additional) voting rights, in a special constituency that covers the area of the entire Republic of Croatia, is not provided; instead, they elect their representatives only on the grounds of general voting rights. In Croatia only the Serb minority participates in the total population with more than 1.5%.

4. Considering that the lists of the Serb minority will compete in all the ten constituencies in the Republic of Croatia under the same conditions as the general lists, all the voters who have general voting rights, not only members of the Serb national minority, will be able to vote for members of the Serb minority. This specifically means that representatives of the Serb minority in the Croatian Parliament may be elected, by voting for the lists of the Serb minority, by Croats, Serbs, Hungarians, Italians, Czechs, Slovaks, Austrians, Bulgarians, Germans, Poles, Roma, Rumanians, Ruthenians, Russians, Turks, Ukrainians, Vlachs, Jews, Albanians, Bosniaks, Montenegrins, Macedonians and Slovenes, voters of other nationalities, those with no national affiliation, those who expressed regional affiliation and those who are of unknown ethnic affiliation.

5. The enactment of differentiated legislation on dual voting rights in Article 19 paras. 2 and 3 of the Constitutional Act on the Rights of National Minorities (*Narodne novine*, nos. 155/02, 47/10 and 80/10) opened the door wide to instituting representatives of the first and second order, about which speculation has for some time existed in professional and political circles. The first would be candidates elected from general lists and the lists of the Serb minority, who would be elected by all the citizens on the grounds of general and equal voting rights, and the second would be candidates of the other minorities elected on the grounds of the second or additional voting right and under special electoral rules.

6. The provisions of Article 19 paras. 2 and 3 of the Constitutional Act on the Rights of National Minorities (*Narodne novine*, nos. 155/02, 47/10 and 80/10) in fact favour only the actors of Serb politics in the electoral process (political parties and Serb minority organisations) over all the other political parties and independent lists that participate in the parliamentary elections. They enable the lists of the Serb minority to compete under equal conditions with the general lists in all the ten constituencies in Croatia, except that the lists of the Serb minority cannot lose the elections. If the general lists do not cross the electoral threshold and do not win seats, their candidates will not be elected to the Croatian Parliament and will as election losers go home, to the employment office or to their old jobs. But if the lists of the Serb minority do not cross the threshold and win seats, their candidates do not lose the elections but go into another procedure in which they will certainly get three seats in the Croatian Parliament.

7. Therefore, for the Constitutional Act on the Rights of National Minorities (*Narodne novine*, nos. 155/02, 47/10 and 80/10) to be in accordance with the Constitution of the Republic of Croatia and the generally adopted principles of civilisation that hold in representational democracy, it is necessary to repeal the dual voting rights for only some minorities or to extend them to all the minorities, equalise their legal status and abolish the different rules for the election of the representatives of minorities that participate in the population of the Republic of Croatia with more than 1.5% (and this is only the Serb minority)."

19. GONG disputes the conformity with the Constitution of Article 1 paras. 2 and 3 with the C(A)A RNM for the following reasons:

"II

I. The Constitution in Article 15 lays down that the Republic of Croatia guarantees equal rights to the members of all national minorities. Furthermore, Article 15 of the Constitution also provides that 'Besides the general electoral right, the special right of the members of national minorities to elect their representatives to the Croatian Parliament may be provided by law.'

The proponent deems that the cited provisions of the Constitutional Act on the Amendment (of the CA RNM – note) and the Act on the Amendment (of the Elections of Representatives to the Parliament of the Republic of Croatia Act - note) contravene Article 15 of the Constitution of the Republic of Croatia because these provisions

violate the right to equal rights of the members of the Serb minority with respect to the members of the other national minorities. The cited provisions result in the members of the Serb national minority not having, in addition to general voting rights, also special voting rights in elections for representatives to Croatian Parliament, as do the members of the other national minorities (which participate in the population of the Republic of Croatia with less than 1.5%). Furthermore, the Proponent submits that Article 15 of the Constitution provides that the members of national minorities may be granted special electoral rights and foresees this possibility for all the national minorities, not only for one particular or for any particular national minorities.

The fact that only the Serb national minority, among all the national minorities, has not been granted special voting rights in addition to general voting rights can also be seen from the fact that the Act on the Amendment in Article 5 explicitly states that the national minority in paragraph 2 of Article 16 of the Act (therefore, the national minority which participates with more than 1.5% in the population of the Republic of Croatia on the day when the Constitutional Act enters into force) is the Serb national minority, which is represented only on the grounds of general voting rights. The fact that no other national minority, except the Serb minority, can satisfy the criterion in Article 5 of the Act on the Amendment (i.e., to be a national minority which participates in the population of the Republic of Croatia with more than 1.5% on the day when the Constitutional Act enters into force) can also be seen from the way in which the relevant point in time for the participation of a national minority is determined ('… for national minorities which on the day when the Constitutional Act enters into force ...').

II. The Proponent deems that the cited provisions of the Constitutional Act on the Amendment and of the Act on the Amendment also contravene Article 45 para. 1 of the Constitution of the Republic of Croatia because they violate the right to equal voting rights of the Serb national minority and the members of all the other national minorities.

In Article 45 para. 1 the Constitution lays down that all the citizens of the Republic of Croatia who have reached the age of eighteen years (voters) shall have universal and equal suffrage in elections for the Croatian Parliament, President of the Republic of Croatia and the European Parliament and in proceedings of deciding on the state referendum, in accordance with the law.

Under the cited provisions of the Constitutional Act on the Amendment and the Act on the Amendment, the members of the Serb national minority only have the general right to vote and must opt whether they will vote for the candidate/representative from the list of the Serb national minority or for the candidate from the party or independent lists in the same constituency, while the members of the other national minorities also have the special voting right, i.e. the right to vote both for a candidate/representative from the list of the national minority and for a candidate from the party or independent lists. Accordingly, the voting right of one national minority (the Serb minority) does not have the same value as the voting rights of the other national minorities.

Therefore, the Act on the Amendment singles out the Serb national minority from the other national minorities and places the members of the Serb national minority in an unfavourable position on the grounds of their national origin in comparison with the other minorities in the Republic of Croatia. This division of national minorities, where one minority specified in the law (the Serb national minority) is guaranteed only general voting rights and the other minorities besides general voting rights also special voting rights, is contrary to the highest values of the constitutional order of the Republic of Croatia, specifically the right to equal rights and national equality (provided for in Article 3 of the Constitution).

The cited provisions of the Act on the Amendment also contravene Article 4 para. 1 of the Framework Convention for the Protection of National Minorities of the Council of Europe (hereinafter: the Framework Convention), which makes part of the

internal legal order of the Republic of Croatia on the grounds of the Act on the Ratification of the Framework Convention for the Protection of National Minorities (*Narodne novine - Međunarodni ugovori*, no. 14/97) and binds the Republic of Croatia to recognise special rights to the members of the national minorities who live on its territory. Under Article 4 para. 1 of the Framework Convention, the parties (of the Framework Convention) undertake to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited. The cited provisions of the Act on the Amendment contravene Article 4 para. 1 of the Framework Convention because in them the members of the Serb national minority are discriminated against in comparison with the members of the other national minorities in the Republic of Croatia as they were not grated equal rights to those of the members of the other national minorities."

V. THE RELEVANT LAW

1) The Constitution of the Republic of Croatia

20. The articles of the Constitution relevant in the review of whether the proposals of the proponents are well founded are Article 1, parts of Article 3, Articles 14, 15 and 16, Article 45 para. 1 and Articles 70, 71 and 74 para. 1 of the Constitution, which read as follows:

"Article 1

The Republic of Croatia is a unitary and indivisible democratic … state.

Power in the Republic of Croatia derives from the people and belongs to the people as a community of free and equal citizens.

The people shall exercise this power through the election of representatives…"

"Article 3

... equal rights, national equality (…) the rule of law and a democratic multiparty system are the highest values of the constitutional order of the Republic of Croatia and the ground for interpretation of the Constitution."

"Article 14

Everyone in the Republic of Croatia shall enjoy rights and freedoms, regardless of race, colour, gender, language, religion, political or other belief, national or social origin, property, birth, education, social status or other characteristics.

All shall be equal before the law."

"Article 15

Members of all national minorities shall have equal rights in the Republic of Croatia.

Equality and protection of the rights of national minorities shall be regulated by the Constitutional Act which shall be adopted in the procedure provided for the organic law.

Besides the general electoral right, the special right of the members of national minorities to elect their representatives into the Croatian Parliament may be provided by law.

Members of all national minorities shall be guaranteed freedom to express their nationality, freedom to use their language and script, and cultural autonomy."

"Article 16

Freedoms and rights may only be restricted by law in order to protect freedoms and rights of others, public order, public morality and health.

Every restriction of freedoms or rights shall be proportional to the nature of the necessity for restriction in each individual case."

"Article 45

All the citizens of the Republic of Croatia who have reached the age of eighteen years (voters) shall have universal and equal suffrage in elections for the Croatian Parliament, … in accordance with the law

(...)"

"Article 70

The Croatian Parliament (Sabor) is a representative body of the people … in the Republic of Croatia."

"Article 71

The Croatian Parliament shall have no less than 100 and no more than 160 members, elected on the basis of direct universal and equal suffrage by secret ballot."

"Article 74

Members of the Croatian Parliament shall have no imperative mandate.

(...)"

21. In Article 1 para. 2 sub.-para. 2 of the Amendments to the Constitution of the Republic of Croatia of 16 June 2010 (*Narodne novine*, no. 76/10; hereinafter: Constitutional Amendments 2010) the Historical Foundations of the Constitution were amended. In the relevant part they read as follows:

"Article 1

In the Constitution of the Republic of Croatia (*Narodne novine*, nos. 56/90, 135/97, 8/98 – consolidated wording, 113/00, 124/00 – consolidated wording, 28/01, 41/01 – consolidated wording and 55/01 - corr.) in Section I HISTORICAL FOUNDATIONS ...

(...)

In paragraph 2 after the word 'order' the rest of the sentence shall be changed and shall read: 'the Republic of Croatia is established as the national state of the Croatian people and the state of the members of national minorities: Serbs, Czechs, Slovaks, Italians, Hungarians, Jews, Germans, Austrian, Ukrainians, Ruthenians, Bosniaks, Slovenians, Montenegrins, Turks, Vlachs, Albanians and others, who are its citizens, who are guaranteed equality with citizens of the Croatian nationality and the realisation of national rights in accordance with the democratic norms of the UN and the lands of the free world.'"

2) The Framework Convention for the Protection of National Minorities of the Council of Europe

22. Also relevant in the review of whether the proposals are well founded is the Framework Convention for the Protection of National Minorities of the Council of

Europe (Act on Ratification of the Framework Convention for the Protection of National Minorities, *Narodne novine - Međunarodni ugovori*. no. 14/97; hereinafter: Framework Convention). It is part of the internal legal order of the Republic of Croatia, and in legal force it is above the law. The relevant provisions of the Framework Convention read as follows:

> "Article 4
>
> (...)
>
> 2. The Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority in all the areas of … political … life. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities.
>
> 3. The measures adopted in accordance with paragraph 2 shall not be considered to be an act of discrimination."
>
> "Article 21
>
> Nothing in the present framework Convention shall be interpreted as implying any right to engage in any activity or perform any act contrary to the fundamental principles of international law and in particular of the sovereign equality, territorial integrity and political independence of States."

VI. THE FINDING OF THE CONSTITUTIONAL COURT

23. In this decision the expression "general voting rights" denotes the general electoral system for the election to the Croatian Parliament of representatives of "the people" in the meaning of Article 1 para. 2 of the Constitution, i.e. representatives of all the citizens of the Republic of Croatia for which the voters vote on the grounds of general and equal suffrage because they are citizens of the Republic of Croatia, regardless of whether they belong to any nationality, under the rules laid down in the election act.

Under existing legislation, this is a proportional electoral system with ten constituencies that return several seats in which, on the basis of party and independent lists of candidates, a total of 140 representatives are elected to the Croatian Parliament (14 representatives in each constituency).

The electoral rules that regulate this system shall hereinafter be termed "general electoral rules", the constituencies "general constituencies", the lists of candidates "general lists of candidates", and a voter's vote in that system a "general vote".

23.1. Furthermore, in this decision the Constitutional Court starts from the legislator's differentiation among national minorities according to the number of their members within the meaning of Article 1 C(A)A RNM. The national minority that participates with more than 1.5% in the population of the Republic of Croatia shall in this decision be termed the "large-sized minority", and the national minorities that participate with less than 1.5% in the population of the Republic of Croatia "small-sized minorities".

It must finally be noted that the question of the general standards for defining a minority as “large-sized” or “small-sized” is not the subject of examination in this proceeding before the Constitutional Court.

1) The election of national minority representatives to the Croatian Parliament in 1999 - 2010

24. The Constitutional Court notes that the legislator has without interruption since 1991 decided to guarantee in advance and ensure by law a certain number of seats in the Croatian Parliament to members of national minorities, reserved seats. Until the entry into force of the C(A)A RNM this guarantee was based on the grounds of constitutional acts that regulated the rights of national minorities and on electoral laws, not on the grounds of the Constitution.

From the introduction of the proportional electoral system in 1999 (Election of Representatives to Croatian Parliament Act, *Narodne novine*, no. 116/99; hereinafter: Parliamentary Elections Act/99), in all the three parliamentary elections so far (2000, 2003 and 2007) the reserved seats for the members of national minorities were filled, on the grounds of special legislation for voters/national minority members, in a special constituency for minorities.

Several statutory (affirmative) measures were instituted with respect to the national minority members’ right to vote and right to stand for office, which are given below in items a) to e).

a) National minority members had the right to be represented in the Croatian Parliament.

b) Legislation was passed in advance reserving an appropriate number of seats to which representatives of national minorities were elected.

c) Elections for national minority representatives were based on the “either-or” principle. Voters/national minority members could freely chose for whom and in which capacity they would vote: either in the capacity of citizens of the Republic of Croatia, regardless of national affiliation, for representatives of “the people”, i.e. representatives of all the citizens of the Republic of Croatia, on the grounds of general and equal suffrage in the ordinary constituencies, or in their capacity as members of a national minority for representatives of national minorities in a special constituency.

d) The above right to option of the voter/national minority member did not affect the position and number of national minority representatives in the Croatian Parliament. If the voters/national minority members chose to vote on the grounds of general and equal suffrage at the elections, in their capacity of citizens of the Republic of Croatia in the general constituencies, not in their capacity of national minority members for representatives of national minorities in a separate constituency, this option did not affect the number of national minority representatives in the Croatian Parliament guaranteed in advance, because it did not depend on the number of votes won at the elections.

e) Independently of how many votes a candidate/national minority member won to be elected to the reserved seat in the Croatian Parliament, in his mandate as an MP, i.e. in his powers, rights, duties and responsibilities as an MP, he was wholly equal to the MPs elected to the Croatian Parliament within the framework of general voting rights. This was because the vote of a voter/national minority member at the Croatian parliamentary elections at the same time contained the potential of a general vote and the potential of a special vote. Which one of them was realised on election day depended on the will of the voter/national minority member.

24.1. The Constitutional Court also reiterates that the number of national minority representatives elected to reserved seats in the Croatian Parliament was subject to change. If we look only at the period from the entry into force of the Parliamentary Elections Act/99 to the entry into force of the Parliamentary Elections (Amendments) Act from 2010, this number changed from the initial five (2000) to eight (2003 and 2007). The most significant increase in the number of reserved seats in the Croatian Parliament took place in respect of representatives of the Serb national minority (from one seat in 2000 to three seats in 2003 and 2007).

25. In accordance with the electoral model described above, in the legislative period from 1999 to 2010 the structure of the Croatian Parliament consisted of:

- 140 representatives elected under general and equal suffrage, which included representatives who by national origin belonged to national minorities in the Republic of Croatia, and

- five (2000) or eight (2003 and 2007) representatives/national minority members who were elected only by national minority voters to reserved parliamentary seats.

In other words, members of national minorities were elected to the Croatian Parliament on two grounds:

- as representatives of "the people" in the meaning of Article 1 paras. 2 and 3 of the Constitution, as citizens, in the framework of the general electoral system,

- and as representatives of a national minority to parliamentary seats reserved for national minorities.

26. The Constitutional Court finds that the above facts are sufficient to recall how the election of national minority members to the Croatian Parliament was regulated in the three last parliamentary elections (2000, 2003 and 2007).

27. The Constitutional Court notes that the impugned Article 1 paras. 2 and 3 C(A)A RNM has retained the system of reserved seats for members of national minorities in the Croatian Parliament. However, the manner of exercising the voting rights of voters/national minority members changed with respect to the legislative period from 1999 to 2010.

In the light of Article 1 paras. 2 and 3 C(A)A RNM, in this proceeding of constitutional review the Constitutional Court must find answers for three principles of constitutional law:

- does the mechanism in Article 1 para. 2 C(A)A RNM, with reserved parliamentary seats for a national minority within the framework of the general electoral system based on general and equal suffrage, comply with the Constitution (see points 29 to 35 of the statement of reasons of this decision)?;

- does the mechanism in Article 1 para. 3 C(A)A RNM, which enables voters/national minority members to have one vote more at Croatian parliamentary elections than the voters/members of the majority people, comply with the Constitution (see points 36 to 52 of the statement of reasons for this decision)?;

- viewing the mechanisms in Article 1 paras. 2 and 3 C(A)A RNM as one whole, does the mechanism enabling the voters/members of small-sized minorities to have one vote more at the Croatian parliamentary elections than the voters/members of the large-sized minority in the Republic of Croatia, comply with the Constitution (see points 53 to 58 of the statement of reasons for this decision)?

28. The answers to the above questions cannot be given without taking into account that the Constitution, as the basic legal act of the Croatian State, is not neutral in the values that it enshrines.

The Constitutional Court already elaborated this important fact of constitutional law in its previous case-law. Thus in point 8.2. of ruling no.: U-I-3789/2003 etc. of 8 December 2010 (*Narodne novine*, no. 142/10), in which the Constitutional Court did not accept proposals to review the conformity with the Constitution of several articles of the Election of Representatives to the Croatian Parliament Act (*Narodne novine*, nos. 116/99, 109/00, 53/03, 69/03 – consolidated wording, 167/03 – Decision about not giving a valid interpretation, 44/06 – Article 27 para. 1 of the State Electoral Commission of the Republic of Croatia Act, 19/07, 20/09 – Decision on giving a valid interpretation; hereinafter: the Parliamentary Elections Act), the Constitutional Court noted:

> "The Constitution is a single whole. It cannot be approached by pulling one provision out from the entirety of the relations that it constitutes and then interpreting it separately and mechanically, independently of all the other values that are enshrined in the Constitution. If it is viewed as unity, the Constitution reflects some all-encompassing principles and basic decisions in connection with which all its individual provisions must be interpreted. Thus no constitutional provision may by pulled out of context and interpreted independently. In other words, each particular constitutional provision must always be interpreted in accordance with the highest values of the constitutional order which are the grounds for interpreting the Constitution itself."

28.1. The Constitutional Court also reiterates that one of the basic requirements in the procedure of the Republic of Croatia's accession to membership in the European Union is the advancement of the protection and the rights of national minorities. An identical requirement exists within the framework of the Council of Europe, of which Croatia has been a member since 1996. These requirements are completely in tune with the fundamental values of the constitutional order of the Republic of Croatia laid down in the Constitution. Thus the Constitutional Court, by the force of its constitutional tasks and powers, controls the realisation of constitutional, but also of

European legal values. In this sense constitutional control of specific mechanisms covers the entire national legislation, also including that which was passed in the procedure of harmonisation with the *acquis communautaire* of the European Union and that which is of special interest for the Council of Europe and the European Union although it is not part of the *acquis*.

2) The special representation of minorities in the framework of the general electoral system

29. The Constitutional Court must begin by noting that examining the substantive conformity of Article 1 para. 2 C(A)A RNM with the Constitution is aggravated by the evident lack of clarity in the wording of the act itself, which opens the possibility of its different, even opposite, interpretation.

This article provides that "national minorities" (plural) are "guaranteed" at least three parliamentary seats for the members of "that national minority" (singular). It is not, therefore, clear whether all the national minorities in Article 1 para. 2 C(A)A RNM together are guaranteed "at least three parliamentary seats", or whether each one of them is guaranteed "at least three parliamentary seats".

This is an error in the linguistic structure of the normative text which arose by inserting in the original wording of the C(A)A RNM Bill sponsored by the Government of the Republic of Croatia amendment I, which was proposed by the Committee for Human and National Minority Rights of the Croatian Parliament ("... in front of the words 'in the Croatian Parliament' shall be added the words: 'members of that national minority' – see point 14 of the statement of reasons of this decision). This error should in itself lead to repealing Article 1 para. 2 C(A)A RNM from the legal order because it impairs the meaning, and thus also the very essence of the legislative measure.

However, starting from the conditions that today exist in the Republic of Croatia, and which directly result in Article 1 para. 2 C(A)A RNM referring to only one large-sized minority, the Constitutional Court decided to continue the examination of the substantive conformity of Article 1 para. 2 C(A)A RNM with the Constitution. For the needs of this proceeding of constitutional review, therefore, it is to be considered that Article 1 para. 2 C(A)A RNM guarantees one large-sized minority "at least three parliamentary seats" in the Croatian Parliament, within the framework of general voting rights.

This is in fact the Serb national minority, because on the day of the entry into force of the C(A)A RNM it was the only one that fulfilled the requirements in Article 1 para. 2. Thus the term "Serb minority" will also be used in addition to the general term "large-sized minority" in the continuation of this decision, depending on the context.

The above finding, however, does not remove the basic objection about the unacceptability in constitutional law of the wording of Article 1 para. 2 C(A)A RNM, which distorts the meaning and essence of that legislative measure thus contravening the requirements for acts based on the rule of law, a highest value of the constitutional order of the Republic of Croatia (Article 3 of the Constitution).

30. The Constitutional Court examined the question about the conformity with the Constitution of a mechanism that foresees reserved seats for a minority within the framework of the system of general voting rights starting from the structural unity of the constitutional text, from which results the objective order of values which the Constitutional Court has the duty to protect and promote (see point 28 of the statement of reasons of this decision).

30.1. The constitutional identity of the Republic of Croatia is determined in paragraph 2 of the Historical Foundations of the Constitution:

> "...the Republic of Croatia is established as the national state of the Croatian people and the state of the members of national minorities: Serbs, Czechs, Slovaks, Italians, Hungarians, Jews, Germans, Austrian, Ukrainians, Ruthenians, Bosniaks, Slovenians, Montenegrins, Turks, Vlachs, Albanians and others, who are its citizens, who are guaranteed equality with citizens of the Croatian nationality and the realisation of national rights in accordance with the democratic norms of the UN and the lands of the free world."

Article 1 para. 1 of the Constitution defines the Republic of Croatia as a democratic state, and paragraph 2 of the Constitution lays down that "power in the Republic of Croatia derives from the people and belongs to the people as a community of free and equal citizens". Article 1 para. 3 of the Constitution provides that "The people shall exercise power through the election of representatives."

Article 3 of the Constitution provides that equal rights, national equality and a democratic multiparty system are the highest values of the constitutional order and the ground for interpretation of the Constitution. All the constitutional values must be realized without discrimination on any grounds (Article 14 para. 1 of the Constitution).

In the light of Article 1 and Article 3 of the Constitution (which is viewed in itself and together with Article 14 of the Constitution), it is also necessary to consider Article 45 para. 1 of the Constitution, which provides that "all the citizens of the Republic of Croatia who have reached the age of eighteen years (voters) shall have universal and equal suffrage in elections for the Croatian Parliament … in accordance with the law", and Article 71 of the Constitution connected with it, which provides that "the Croatian Parliament shall have no less than 100 and no more than 160 representatives, elected on the basis of direct universal and equal suffrage by secret ballot". Furthermore, Article 70 of the Constitution defines the Croatian Parliament (also) as "a representative body of the people", while Article 74 para. 1 of the Constitution guarantees representatives a free mandate.

30.2. It results from the above-mentioned Historical Foundations and the relevant constitutional provisions that the Constitution accepted the civil concept of the state in which all its citizens – which includes members of the Croatian people and members of all the national minorities – make up "the people" (German *Staatsvolk,* the state's people).

"The people" thus defined – i.e. the "community of free and equal citizens" – realises power by electing its representatives to the Croatian Parliament, the representational body of the citizens, on the grounds of general and equal suffrage.

In accordance with the above, the Constitutional Court finds that the Constitution does not allow parliamentary seats to be reserved in advance for any minority on any grounds (national, ethnic, linguistic, sex, age, educational, professional, property and so on) in the framework of the general electoral system. This system is set up to realise the power "of the people" within the meaning of Article 1 paras. 2 and 3 of the Constitution and is the direct expression of equal rights, national equality and a multiparty democratic system, highest values of the constitutional order of the Republic of Croatia (Article 3 of the Constitution).

31. Despite this, Article 1 para. 2 C(A)A RNM provides:

> Article 1
>
> In the Constitutional Act on the Rights of National Minorities (*Narodne novine*, nos. 155/2002 and 47/2010), Article 19 shall be amended and shall read:
>
> '(1) …
>
> (2) The national minorities which on the day when this Constitutional Act enters into force participate in the population of the Republic of Croatia with more than 1.5% shall be guaranteed at least three seats in the Croatian Parliament for members of that national minority who exercise their representation on the grounds of the general right to vote on the party lists of that minority or lists that are proposed by the voters of that minority, in accordance with the law that regulates the election of representatives to the Croatian Parliament.
>
> (3) ...'"

For the first time in the history of electoral legislation in the Republic of Croatia, in Article 1 para. 2 C(A)A RNM the legislator provided for a solution designed to ensure "at least three parliamentary seats" in the Croatian Parliament for the members of one national minority by using reserved parliamentary seats in the framework of the general electoral system (i.e. in ordinary constituencies).

It is, therefore, obvious that Article 1 para. 2 C(A)A RNM does not comply with the requirement in constitutional law, explained in point 30.2. of the statement of reasons of this decision, because it guarantees reserved parliamentary seats for one group of voters, on the basis of their national affiliation, within the framework of the general electoral system.

In this sense S. Barić states in her expert opinion:

> "Any singling out of any group of Croatian citizens from the total body of 'the people' under any criterion, so also under the criterion of national affiliation, and creating a mechanism by which such a group is specially represented through general and equal voting rights, I consider unacceptable in constitutional law, i.e. contrary to the basic letter and meaning of the Constitution of the Republic of Croatia, to the fundamental concept of 'the people' 'from which derives power and to which power belongs'. This kind of mechanism presumes that there are different, constitutionally acknowledged and recognised parts of the people, which is to be reflected in the representation of certain parts of the general and common concept of the people. This is not the case with the Constitution of the Republic of Croatia. The people is one and in the meaning of constitution law it is formed of all the citizens of the Republic of Croatia, regardless of their personal characteristics, and thus also of national affiliation."

The Constitutional Court accepts the view that Article 1 para. 2 C(A)A RNM singled out one minority group of citizens from the total body of "the people" using the criterion of national affiliation and that it "acknowledged and recognised" it as a separate "part of the people", which is in breach of the constitutional tenet about the "one and integral people" which, as the community of citizens, realises power in the Republic of Croatia.

32. Furthermore, the solution contained in Article 1 para. 2 C(A)A RNM directly infringes the basic constitutional requirement of the equal suffrage of all the voters/citizens of the Republic of Croatia within the framework of the general electoral system. The system of reserved parliamentary seats presupposes that special measures will be ensured for the candidates/national minority members to really be elected to the parliamentary seats in the Croatian Parliament reserved for them in advance. This presupposes recognising various preference measures to the benefit of "minority" lists of candidates, and by the nature of things these measures lead to the inequality of voting rights within the framework of the general electoral system, which the Constitution does not allow.

33. At the end, the Constitutional Court notes that the guarantee of "at least three parliamentary seats" for the members of the large-sized (i.e. Serb) minority within the framework of the general electoral system, in the way in which this was regulated in the C(A)A RNM, leads to confusion from the aspect of constitutional law in the structure of representatives to the Croatian Parliament. If (at least) three representatives of the Serb minority are elected by all the voters/Croatian citizens (i.e. "the people" within the meaning of Article 1 para. 2 of the Constitution), then there are grounds to ask: what is the difference between these (at least) three representatives of the Serb minority and the other representatives, especially those of Serb nationality who are also elected by the same circle of voters ("the people") within the framework of the general electoral system, but are not candidates from the lists of candidates put forward by the political parties that represent the Serb minority or the lists proposed by voters of Serb minority, but candidates from the lists of candidates put forward by other political parties, i.e. from independent (general) lists of candidates?

It seems that there would be no substantive difference among them, because they would all be elected by "the people" in the meaning of Article 1 para. 2 of the Constitution within the framework of the general electoral system. The only difference is in the legal position of the proponents of the lists of candidates, because Article 1 para. 1 C(A)A RNM guarantees (at least) three parliamentary seats to the candidates who were on the lists of registered political parties that represent the Serb minority, or candidates proposed on their ("minority") independent lists by voters of the Serb minority.

The Constitutional Court notes that this difference among the proponents of lists of candidates in the framework of the general electoral system came about by inserting amendment I in the original text of the C(A)A RNM Bill sponsored by the Government of the Republic of Croatia, which was proposed by the Committee for Human and National Minority Rights of the Croatian Parliament ("...after the words 'general right to vote' shall be added the words: 'on the party lists of that minority or lists that are

proposed by the voters of that minority'" – see item 14 of the statement of reasons of this decision).

The Constitutional Court does not find it necessary, in this proceeding of constitutional review, to specially examine all the consequences of the above difference in the legal position of the proponents of lists of candidates in the framework of the general electoral system. It is enough to note, for example, that Article 1 para. 2 C(A)A RNM, in the part that provides that independent lists of candidates of voters of the Serb minority may be proposed only by "voters of that minority" opens many serious questions. The effects of this provision must be viewed in the light of the fact that in the constitutional order of the Republic of Croatia every individual may freely dispose of his or her national affiliation. At the same time, however, this provision must also be seen in the light of the constitutional requirement for the protection of privacy, since its implementation by the nature of things presumes that the proponents of "minority" independent lists must publicly declare their national affiliation within the framework of the general electoral system, i.e. the obligation of the competent state bodies to validate, within the framework of the general electoral system, whether every single proponent of such an independent list belongs to the Serb minority.

34. Because of the reasons given above, the Constitutional Court must find that Article 1 para. 2 C(A)A RNM contains a legislative measure that cannot be considered acceptable from the aspect of constitutional law.

It seems that the solution adopted in Article 1 para. 2 C(A)A RNM will primarily result in the members of the "large-sized" minority achieving a particular electoral result (a political objective), and not in the realisation of their national equality (an objective permitted in constitutional law) (S. Barić). Therefore the mechanism contained in Article 1 para. 2 C(A)A RNM contravenes Article 1 paras. 2 and 3 of the Constitution, if it is considered from the aspect of equal rights, national equality and the multiparty democratic system, highest values of the constitutional order of the Republic of Croatia (Article 3 of the Constitution).

34.1. The Constitutional Court finally specially notes that the above finding does not preclude the application of reserved seats in the Croatian Parliament for national minority members outside the general electoral system.

It also does not preclude the application of appropriate statutory measures within the framework of the general electoral system. Starting from the principles of the Commission for Democracy through Law (the Venice Commission), the advisory body of the Council of Europe for constitutional questions, the following statutory measures could be applied: - recognising the right of political parties that represent national minorities to participate in the elections based on general and equal suffrage; - regulating a special electoral threshold for political parties that represent national minorities which would be different from the statutory general threshold; - designing constituencies (their number, size and form) so as to enhance national minority participation in the legislative body, or generally – introducing an as proportional as possible electoral system, etc. (see *Venice Commission Report on electoral rules and affirmative action for national minorities participation in decision-*

making process in European countries, CDL-AD(2005)009, 62th Plenary Session, Venice, 11-12 March 2005, § 68).

35. For the reasons given in items 29 to 34 of the statement of reasons of this decision, the Constitutional Court has repealed Article 1 para. 2 C(A)A RNM.

3) Special voting rights of national minority members

36. In Article 7 of the Amendments to the Constitution of the Republic of Croatia of 9 November 2000 (*Narodne novine*, no. 113/00), Article 15 of the Constitution was (also) supplemented by the new paragraph 3, which reads as follows:

> "Article 7
>
> After Article 15 paragraph 1 shall be added the new paragraphs … 3, which shall read:
>
> '(...)
>
> Besides the general electoral right, the special right of the members of national minorities to elect their representatives to the Croatian Parliament may be provided by law.
>
> (...)"

Article 1 para. 3 C(A)A RNM reads as follows:

> "Article 1
>
> In the Constitutional Act on the Rights of National Minorities (*Narodne novine*, nos. 155/2002 and 47/2010), Article 19 shall be amended and shall read:
>
> (…)
>
> (3) National minorities which participate in the population of the Republic of Croatia with less than 1.5%, in addition to the general right to vote have the right to elect five representatives who are national minority members in special constituencies on the grounds of special voting rights, which cannot reduce the acquired rights of national minorities, in accordance with the law that regulates the election of representatives to the Croatian Parliament."

The Constitutional Court notes that all the proponents maintain in their proposals that Article 15 para. 3 of the Constitution enables, and Article 1 para. 3 C(A)A RNM implements the right of members of the "small-sized" minorities to have one vote more at Croatian parliamentary elections than voters/members of the majority people, which they use (the second vote) to elect "their representatives" to the Croatian Parliament. This (second) vote of the members of the "small-sized" minorities shall in the continuation of the statement of reasons of this decision be called the "supplementary vote", since the same voters have the right with their (first) general vote to elect representatives to the Croatian Parliament within the framework of the general electoral system, on the grounds of their citizenship in the Republic of Croatia.

37. The Constitutional Court does not deem it necessary in this proceeding of constitutional review to examine in detail the content and limits of Article 15 para. 3 of the Constitution. It is sufficient to find that the interpretation of Article 15 para. 3 of the Constitution, which the proponents give in their proposals, is legitimate and sustainable under constitutional law.

At the same time, however, the Constitutional Court has the duty to note that the "special right" of national minority members to "elect their representatives to the Croatian Parliament" is not exhausted only by providing the voter/national minority member with a supplementary vote. This right can also be realised without recognising a supplementary vote for national minority members, which depends on the type and kind of electoral system in which it is realised.

Therefore, the content and the scope of Article 15 para. 3 of the Constitution is broader "than the right to a supplementary vote", which the Constitutional Court will consider in this decision.

Accordingly, remaining within the framework of the proponents' objections, the special right of national minority members to "elect their representatives to the Croatian Parliament" will in the continuation of the statement of reasons of this decision also be called the "right to a supplementary vote", bearing in mind that this is only one possible form of realising the special right of national minority members to "elect their representatives to the Croatian Parliament", contained in Article 15 para. 3 of the Constitution.

38. The Constitutional Court also examined the question of the conformity with the Constitution of the mechanism in Article 1 para. 3 C(A)A RNM which provides voters/national minority members with a supplementary vote at Croatian parliamentary elections, starting from the structural integrity of the constitutional text from which results the objective order of values that the Constitutional Court has the duty to protect and promote (see point 28 of the statement of reasons of this decision). Besides the values listed in points 30.1. and 30.2. of the reasons, this question is also linked with the requirement for the proportionality of the legislative measure of restricting the equality of suffrage in a democratic society (Article 16 taken with Article 1 para. 1 and Article 45 para. 1 of the Constitution).

39. In this sense the Constitutional Court reiterates that the institute of representatives who are elected to the Croatian Parliament exclusively by voters/national minority members as "their representatives", for which they use their (second) supplementary vote, appears in the constitutional and electoral legislative order in the Republic of Croatia for the first time. It should not be identified with the institute of the representatives of national minorities who were elected to the Croatian Parliament at the elections of 2000, 2003 and 2007 because these representatives were elected by the one and only vote of voters/national minority members, which also carried within it the potential of the general vote (see point 24.e of the statement of reasons of this decision).

40. In the view of the Constitutional Court, the above places special demands on reviewing the conformity with the Constitution of Article 1 para. 3 C(A)A RNM. These demands appear in relation to two issues of constitutional law. They are the following:

- what must be the legal force of the act regulating the mandate of the representatives of national minorities elected exclusively by the (second) supplementary vote of national minority members within the meaning of Article 15 para. 3 of the Constitution, and

- what preconditions must be met to consider the application of the constitutional potential in Article 15 para. 3 of the Constitution justified under constitutional law?

a) The regulation of the representative mandate in Article 15 para. 3 of the Constitution

41. It is indisputable that Article 15 para. 3 of the Constitution cannot be applied directly. For its application it is first necessary to also regulate, besides the electoral system itself, the mandate (i.e. the scope and content of the representative's powers and the rights, obligations and responsibilities) of the representatives of national minorities elected exclusively by the (second) supplementary vote of national minority members within the meaning of Article 15 para. 3 of the Constitution.

The Constitution itself does not regulate this representative mandate nor does it in any way link it with the ordinary parliamentary mandate in Article 45 para. 1 and Article 71 of the Constitution. This indicates that Article 15 para. 3 of the Constitution does not contain a fundamental structural principle underpinning the organisation of the Croatian constitutional state, but a separate state objective that does not influence its constitutional structure. On the other hand, starting from the fact that realising the above separate state objective may have a temporary effect on the system of representational rule in the Republic of Croatia, this is undoubtedly an objective of constitutional importance.

42. The above finding is the guideline for answering the question about the legal force of the act that regulates the mandate of the representatives in Article 15 para. 3 of the Constitution before it is applied in electoral practice.

Because of the constitutional importance of the separate state objective provided for in that article, there seems to be no doubt that it still remains the obligation of the framer of the Constitution.

In other words, it follows from the Constitution that the mandate of representatives in Article 15 para. 3 of the Constitution must be regulated in an act with constitutional force. Besides the Constitution itself, only an act with constitutional force can give constitutional force to the position of the representatives of the national minorities in Article 15 para. 3 of the Constitution.

The Constitutional Court notes that the mandate (i.e. the scope and content of representative powers and rights, obligations and responsibilities) of the representatives of the national minorities in Article 15 para. 3 of the Constitution need not necessarily differ from the mandate which the force of the Constitution confers on the representatives elected on the grounds of the general and equal suffrage of all the voters/citizens of the Republic of Croatia in the framework of the general electoral system. It depends only on the will of the framer of the Constitution whether the mandate of the representatives of the minorities in Article 15 para. 3 of the Constitution will be equalised under constitutional law with the "general" mandate of the representatives elected under the general electoral system, or whether certain special features will be laid down for this mandate considering that these representatives were elected exclusively by the (second) supplementary votes of voters/national minority members within the meaning of Article 15 para. 3 of the

Constitution, and consequently do not represent “the people” in the meaning of Article 1 paras. 2 and 3 of the Constitution.

The prior regulation of the above issues in an act with constitutional force is the constitutional prerequisite for the application of Article 15 para. 3 of the Constitution in electoral practice.

43. Only if this prerequisite is realised does the decision of the Constitution framer to constitute “by law” the special right of national minority members to “elect their own representatives to the Croatian Parliament” become clear, understandable and uncontradictory.

The “law” in Article 15 para. 3 of the Constitution is an organic law that regulates the election of representatives to the Croatian Parliament and is passed by a majority vote of all the representatives (Article 82 para. 2 of the Constitution). This conclusion results from the nature of the material that Article 15 para. 3 of the Constitution regulates.

44. In short, Article 15 paras. 2 and 3 of the Constitution contain a differentiated and hierarchical structure of legislation regulating particular national minority rights.

a) First, the equality and protection of the rights of national minorities must be regulated in a “constitutional act” which is passed under the procedure for passing organic acts, with a two-thirds majority vote of all the representatives – Article 15 para. 2 taken with Article 82 para. 1 of the Constitution.

b) Second, if the Croatian Parliament decides to confer on the members of national minorities the special right to “elect their representatives” (which is not its obligation), then it must first:

- elaborate the mandate of the representatives of the national minorities in Article 15 para. 3 of the Constitution in an act with constitutional force, which is passed in the procedure for passing amendments to the Constitution (by the nature of things this can also be done by amending or supplementing the Constitution itself), and

- in accordance with the above, underpin the special right of the members of national minorities to “elect their representatives to the Croatian Parliament” with an electoral law that does not have the highest legal force in the hierarchy of organic laws because it is passed by the majority of all the representatives – Article 82 para. 2 of the Constitution.

Consequently, the mandate of the representatives in Article 15 para. 3 of the Constitution must be regulated in a law with constitutional force. Its passage is also the constitutional prerequisite for applying the possibility in Article 15 para. 3 of the Constitution, i.e. for the legislative recognition of the special voting right for the members of national minorities to elect their representatives to the Croatian Parliament.

45. In this proceeding of constitutional review the Constitutional Court has restricted itself to finding that the mandate of the representatives in Article 15 para. 3

of the Constitution has so far not been regulated in the constitutional order of the Republic of Croatia in accordance with the requirements that result from the Constitution.

Considering Article 1 para. 3 C(A)A RNM in the light of constitutional requirements, it becomes clear that it does not meet, in electoral practice, the above constitutional preconditions for the application of Article 15 para. 3 of the Constitution.

Despite its name, the C(A)A RNM (as also the entire CA RNM) is an organic law that does not have constitutional force because it was not passed in the procedure for passing and amending the Constitution (see point 9 of the statement of reasons of this decision). Thus the C(A)A RNM, from the aspect of formal constitutionality, does not have the force necessary to regulate the mandate of the representatives in Article 15 para. 3 of the Constitution. Furthermore, even hypothetically assuming that it had been passed in the procedure for enacting and amending the Constitution, the C(A)A RNM does not regulate the mandate of the representatives in Article 15 para. 3 of the Constitution in any way. Even in this hypothetical situation, therefore, Article 1 para. 3 C(A)A RNM could not be found in conformity with the requirements that result from Article 15 para. 3 of the Constitution.

Finally, if the C(A)A RNM is viewed from the aspect of substantive constitutionality, it is not the act that should recognise the special right of national minority members to elect their representatives to the Croatian Parliament. This right, after all the constitutional prerequisites have been met, should be recognised and regulated in an electoral act.

46. For the reasons given in points 42 to 45 of the statement of reasons of this decision, Article 1 para. 3 C(A)A RNM shows itself in breach of the prerequisites that result from Article 15 para. 3 of the Constitution with respect to the act that should regulate the special right of national minority members to elect their own representatives to the Croatian Parliament, and the mandate of these representatives.

b) The justification under constitutional law for the application of Article 15 para. 3 of the Constitution

47. Even if the prerequisites described in points 41 to 45 of the statement of reasons of this decision were met, the application of the constitutional possibility in Article 15 para. 3 of the Constitution would necessarily presume the prior test of the justification for introducing that statutory measure and an estimate of its effects.

Recognising a supplementary vote for national minority members must have a rational foundation and reasonable justification based on the underlying facts. It must at the same time also be legitimised from the aspect of proportionality. This means that the special voting right in Article 15 para. 3 of the Constitution could only be justified if there were no other milder means for realising the desired objective, i.e. means that would encroach less on the equality of the voting rights of the other voters.

48. The Constitutional Court in this sense accepts the legal principles of the Venice Commission, contained in its *Report on Dual Voting for Persons Belonging to National Minorities,* adopted by the Council for Democratic Elections at its 25th meeting (Venice, 12 June 2008) and the Venice Commission at its 75th plenary session (Venice, 13-14 June 2008), Study No. 387/2006, CDL-AD(2008)013, Strasbourg, 16 June 2008. "Dual voting" is identical in content with the "supplementary vote" as a form of the special right of members of national minorities to elect their representatives to the Croatian Parliament within the meaning of Article 15 para. 3 of the Constitution (see point 37 of the statement of reasons of this decision). This report, among other things, states:

"**VII. The specific issue of dual vote**

1. In a general way, the opinion of the HCNM, according to which the integration of minorities into society is the best conflict prevention strategy, has to be approved. It was enriched by the Commission's observations on the notion and the principle of "citizen's identity" or of acquired "citizenship" that goes beyond ethnic identity, which leads to progressive and successful integration. This is the aim to be reached and a way of preventing conflict in an efficient manner.
2. According to the HCNM, 'States enjoy less flexibility in altering the 'one person, one vote' principle ("Equal voting rights; equal numerical value of votes" – footnote 13 in the original text – note), than in designing the methods that translate votes into seats of parliament" (…). Departure from the principle may only be exceptional: exceptions should be justified only by the impossibility to reach the expected result through implementation of the numerous special mechanisms which are available, including positive discrimination in conversion of votes into seats.
3. The issue remains whether these exceptions are completely inadmissible. The Court has not adjudicated this question. In brief, two kinds of arguments may be adduced for the general inadmissibility of such exceptions. First, they might be said to be inadmissible because the principle of equal voting rights is to be considered of an absolute nature. Such an absolute character, however, would be a peculiarity in electoral or human rights law, if not in law in general. The second argument for a general inadmissibility might be based on the assumption that other measures allowing for minority representation are always at hand. Such assumption requires further examination.
4. In some specific cases, the dual voting system for persons belonging to national minorities can reconcile the requirement of providing for a reserved representation of a minority, especially if a State comes from a totalitarian experience, with the necessity of favouring the integration of the minority in the national political life. It is an example of reverse discrimination which may be justified by the history of a country, at least until the effects of the repression and of the totalitarian regime are satisfactorily (even if only partially) cancelled. It may be the only system to ensure, on the one side, that the minority has the guarantee of being represented in public affairs, and, on the other side, that the persons belonging to the national minorities are allowed, on an equal basis, to take part in the national political debate.
5. Instead of taking an abstract stand on the admissibility of a dual voting system, the specific circumstances of each case have to be examined. It can only be justified in the framework of the Constitution and has to respect the principle of proportionality ("Cf. European Commission of Human Rights, decision of 1 September 1993, *Hewitt and Harman v. the United Kingdom*, application 20317/92" – footnote no 14 in the original text – note).
6. Respect of the principle of proportionality should take into account all its aspects. It concerns of course proportionality in the narrow sense, *i.e.* balancing the aim pursued and the restriction to the right in question. It includes also instrumentality of the

measure, *i.e.* its ability to reach the pursued aim, the largest possible integration of persons belonging to national minorities in the political system.
7. The principle of proportionality implies that the dual voting system is not justified if other measures to ensure participation of minorities in public life exist which do not impinge, or impinge less, on other voters' right to equal suffrage. The possibility to apply these other measures should be taken into account. However, the mere fact that other measures than dual vote exist, and indeed have been adopted by other States, does not call for the conclusion *in abstracto* that the dual vote is unacceptable as such. Nevertheless when the pursued aim may be reached by such other measures, dual voting will not pass the test of proportionality.
8. In these cases, it seems unlikely that granting dual voting rights to a "privileged minority" will improve their relations with other citizens. Indeed, such a privilege, in the legal sense of the term, could lead to conflict. Other solutions, such as those described in this framework allow the avoidance of interference with the principle of equality or at least for less important inequalities, involving only the principle of equal voting power.
9. Dual voting may only be justified on a temporary basis, in view of a better integration of minorities into the political system in the future. If after a certain time this aim can be pursued by other less restrictive measures which do not infringe upon equal voting rights, the system of dual voting is no longer justified.
10. Only small-sized minorities need to be represented through dual voting. Larger minorities may actually be represented by adjusting the electoral system, for example through specific constituencies, a more proportional electoral system or exemption from the threshold for minority lists.

VIII. Conclusion

(...)

11. The long-term interests of minorities and of societies as a whole are in principle better served by representation under the “ordinary electoral system” which guarantees equal rights to citizens, irrespective of the group to which they are initially affiliated. However, this does not exclude specific measures of a transitional nature when needed in order to ensure proper representation of minorities. These solutions include *inter alia* exceptions to rules on the threshold, reserved seats and overrepresentation of districts in which the minority is in a majority.

(...)

12. On the basis of the previous developments, the Commission concludes that dual voting is an exceptional measure, which has to be within the framework of the Constitution, and may be admitted if it respects the principle of proportionality under its various aspects (“See above paragraph 60.” – footnote no. 15 in the original text – note). This implies that it can only be justified if:

- it is impossible to reach the aim pursued through other less restrictive measures which do not infringe upon equal voting rights;
- it has a transitional character;
- it concerns only a small minority.

13. Given the exceptional nature of dual voting, the fulfilment of the above-mentioned conditions (in particular, those that refer to its functionality as a means of integrating minorities in the political system and its limited scope) should be periodically reviewed, in order to maintain its transitional character (meaning the transitional character of dual voting – note).”

49. The above shows that the Venice Commission deems it necessary to test the justification of introducing a supplementary vote because this is always an exceptional measure of an instrumental nature and is justified only when the given aim (i.e. the integration of the minority in the political system) cannot be achieved by

the application of other measures, less restrictive with respect to the equality of the voting rights of other voters. The test of justification, therefore, always centres on the principle of proportionality.

Finally, the Venice Commission deems that the right to a supplementary vote has a limited scope. Its recognition can be justified only if it refers to a "small-sized" minatory and has a transitional, and therefore a temporary character.

50. If Article 1 para. 3 C(A)A RNM is viewed in the light of the above standards, it can immediately be seen that recognising the right to a supplementary vote only for "small-sized" minorities is in harmony with them.

In the explanation of the C(A)A RNM Bill, however, there is nothing to show that during its preparation a test was made of the justification of introducing this exceptional statutory measure of a transitional character in accordance with the legal standards the Venice Commission established in its report.

For example, there are no facts showing that this statutory measure is proportional, i.e. that no other measures exist that also ensure the representation of national minorities in the Croatian Parliament but which do not encroach, or encroach less, in the equality of the voting rights of the other voters. Even more important is the fact that the C(A)A RNM Bill gave no reasons explaining why it was necessary to introduce the extraordinary measure of additional supplementary voting rights for the voters/members of the "small-sized" minorities, in addition to the already existing system of reserved parliamentary seats for minorities.

What is lacking, therefore, is an explanation of why the system of statutory measures that was in force until the enactment of the C(A)A RNM is no longer sufficient to ensure minority integration in the political system in the transitional period of a state in transition (to be more precise: in the period when the state is gradually emerging from the period of transition).

Lacking also is an explanation of the assessment of the consequences that introducing the supplementary vote of the voters/national minority members at the Croatian parliamentary elections could have on the system of representational rule, considering that each individual freely disposes of his national affiliation in the constitutional order of the Republic of Croatia.

51. In the lack of any explanation of the reasons why the measure in Article 1 para. 3 C(A)A RNM was introduced, the Constitutional Court will only keep to the evaluation of its effects in the light of the requirement for the proportionality of restricting the equality of suffrage in a democratic society.

Considering the specific facts and circumstances connected with the representation of national minorities in the Croatian Parliament in the last three parliamentary elections (2000, 2003 and 2007), it does not seem likely that the right to a supplementary vote will ensure a greater degree of the integration of national minorities in political life than what had already been achieved before the entry into force of the C(A)A RNM through the system of reserved seats for the minorities. At the same time, however, this right infringes the equality of voting rights to a far

greater measure than the statutory measures that were in force until the entry into force of the C(A)A RNM.

Therefore, the measure in Article 1 para. 3 C(A)A RNM – in the light of the specific circumstances – cannot be found to be proportional. Lacking the explanation of an objective and reasonable justification for the reasons of introducing it, and bearing in mind that the electoral order already contains a system of reserved parliamentary seats for national minority representatives, there are grounds to conclude that the effects of this measure excessively infringe on the equality of suffrage in a democratic society (Article 16 taken with Article 1 para. 1 and Article 45 para. 1 of the Constitution).

52. For the reasons given in points 41 to 51 of the statement of reasons of this decision, the Constitutional Court has repealed Article 1 para. 3 C(A)A RNM.

4) The equality among national minorities in the election procedure

53. Although it has already found that Article 1 para. 2 separately contravenes the Constitution and that Article 1 para. 3 C(A)A RNM separately contravenes the Constitution, the Constitutional Court deems it necessary to also give a substantive answer to the third question asked. This was: "Viewing the mechanisms contained in Article 1 paras. 2 and 3 C(A)A RNM as an integral whole, is the mechanism that enables the voters/members of small-sized national minorities to have one vote more than the voters/members of the most numerous national minority in the Republic of Croatia at the elections for the Croatian Parliament in conformity with the Constitution?"

54. The framer of the Constitution requires the equal rights of national minorities both with respect to "majority – minority" and in the "minority – minority" interrelationship.

The principle of "majority – minority" equality is contained in Article 3 of the Constitution, which provides that "national equality" is a highest value of the constitutional order of the Republic of Croatia and ground for interpretation of the Constitution.

The principle of "minority – minority" equality is contained in Article 15 para. 1 of the Constitution which provides: "Members of all national minorities shall have equal rights in the Republic of Croatia."

55. The Constitutional Court notes that achieving formal equality among minorities need not mean, and in practical life usually does not mean, that they are mutually equal. When there is one or more larger national minority in a society in comparison with the others, it is not enough to interpret the constitutional requirement for their mutual equality as formal equality (as most of the proponents do). More important than this are the real effects of the measures applied. These measures may differ, even depending on whether it is a case of "large-sized" or "small-sized" minorities.

56. Although the relevant provisions of the C(A)A RNM contravene the Constitution, the Constitutional Court nevertheless reiterates that Article 1 para. 3

C(A)A RNM recognises the right to a supplementary vote for the members of “small-sized” minorities, in the meaning of Article 15 para. 3 of the Constitution, in a special constituency in which the voters/national minority members elect “their representatives” to five reserved seats in the Croatian Parliament.

On the other hand, under Article 1 para. 2 C(A)A RNM the members of the “large-sized” (i.e. Serb) minority vote with all the voters/Croatian citizens (not only the members of that minority) within the framework of the general constituencies, in which the representatives of the Serb minority are elected to at least three reserved seats in the Croatian Parliament from the lists of candidates of political parties and voters that represent the Serb minority (the fact that members of the Serb minority are also elected to the Croatian Parliament from the lists of candidates of other political parties and voters, under the general rules that are valid within the framework of the general electoral system, is not relevant in this context).

Therefore, both Article 1 para. 2 and Article 1 para. 3 C(A)A RNM introduce a special voting right of which no national minority is deprived, regardless of the number of its members.

56.1. Repeatedly reiterating that these provisions are not in conformity with the Constitution for the reasons given in the above points of the statement of reason of this decision, the Constitutional Court will continue to use Article 1 paras. 2 and 3 C(A)A RNM as an example in explaining the legal principle it has adopted in connection with the issue being examined in this part of the statement of reasons of the decision.

The difference in substantive law between the special voting right of the “small-sized” minorities and that which was recognised for the Serb minority may be reduced to the following facts:

- the special voting right of the members of the “small-sized” minorities covers both their right to vote and their right to stand for office, so that its special features could be described as the “exclusive right to stand for office” and the “exclusive right to elect their representatives”;

- the special voting right of members of the Serb minority extends only to their right to stand for office, so that it can be described as the “exclusive right to stand for office” but not also as the “exclusive right to elect their representatives”, since all the other votes in the general constituencies also have the right to vote for the candidates/members of the Serb minority, although they are not its members.

From the aspect of the effects of the above special voting rights, it seems indisputable that the special voting right of the Serb minority enables the electoral success of that minority in a far greater measure than does the special voting right of the “small-sized” minorities. The special voting right of the Serb minority directly opens the possibility of this minority winning – in addition to the reserved seats in the Croatian Parliament – additional parliamentary sears since its electoral base extends to all the voters/citizens of the Republic of Croatia, regardless of national affiliation. From this aspect the objections of most of the proponents that the Serb minority is

discriminated against with respect to the “small-sized” minorities shows itself manifestly unfounded.

57. Furthermore, the Constitutional Court brings to mind Article 4 para. 2 of the Framework Convention for the Protection of National Minorities, which lays down that the “Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of … political … life, full and effective equality between persons belonging to a national minority and those belonging to the majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities.” To these “specific conditions” also belongs the number of the members of a particular national minority in a society, both in relation to the majority and in relation to the other national minorities.

In this sense the Venice Commission takes the firm stand that the supplementary vote may only be recognised for members of “small-sized” minorities. It seems that this stand is grounded on the fact that recognising a supplementary vote for “large-sized” minorities could lead to structural disorder in the system of representational rule, because of which the Venice Commission implicitly qualifies this statutory measure *a priori* unacceptable in a democratic society in the case of “large-sized” minorities.

The Constitutional Court does not deem it necessary to examine, in this proceeding of constitutional review, whether the recognition of a supplementary vote for the “large-sized” (i.e. Serb) minority would be (un)acceptable in constitutional law under the conditions that exist in the Republic of Croatia. It limits itself only to presenting the principle it has adopted: the possible unacceptability of applying a certain statutory measure to “large-sized” minorities should by no means result in the automatic unacceptability of its application to “small-sized” minorities as well (or vice-versa).

Taking the example in Article 1 paras. 2 and 3 C(A)A RNM, this would mean the following: starting from the interpretation of Article 15 para. 3 of the Constitution, from which most of the proponents in this proceeding of constitutional review start (i.e. that no difference may be made between minorities in the issue of recognising the right to a supplementary vote), the possible finding that the application of the supplementary vote to the “large-sized” minority is unacceptable under constitutional law would directly result in the prohibition of its application to all the other (“small-sized”) minorities in the Republic of Croatia as well.

This interpretation undoubtedly does not identify either the meaning or the objective of Article 15 para. 3 of the Constitution.

58. In the light of what has been said above, the Constitutional Court does not see that the objections of most of the proponents (i.e. that a supplementary vote at the Croatian parliamentary elections is recognised for all the other minorities except the Serb minority, because of which this “large-sized” minority is discriminated against in comparison with the “small-sized” minorities) are well founded in constitutional law.

Article 15 para. 3 of the Constitution (“Besides the ordinary electoral right, the special right of the members of national minorities to elect their representatives into the

Croatian Parliament may be provided by law.”) undoubtedly requires a contextual and teleological interpretation.

Within this framework it is sufficient to find that the above constitutional provision does not lead to the unequivocal conclusion that the Constitution lays down: “either all or none”, as long as the recognition of the right to a supplementary vote only for some but not for all national minorities does not discriminate against those who do not have this right.

VII. ARTICLE 1 PARAGRAPH 1 C(A)A RNM

59. The repeal of Article 1 paras. 2 and 3 C(A)A RNM because they contravene the Constitution has left the provision under which “The Republic of Croatian guarantees the members of national minorities the right to representation in the Croatian Parliament” as the only content of Article 1 C(A)A RNM. This is the provision in Article 1 para. 2 sub-para. 1 (in short: Article 1 para. 1) C(A)A RNM.

The conformity of Article 1 para. 1 C(A)A RNM has not been disputed before the Constitutional Court. It amended Article 19 para. 1 CA RNM in such a way that the previous word “rights” (in the plural) was replaced by the word “right” (in the singular). It reads as follows:

> “Article 1
>
> In the Constitutional Act on the Rights of National Minorities (*Narodne novine*, nos. 155/2002 and 47/2010), Article 19 shall be amended and shall read:
> ‘(1) The Republic of Croatia guarantees the members of national minorities the right to representation in the Croatian Parliament.
> (...)”

The above provision is wholly constitutionally acceptable from the aspect of substantive law, and will remain such as long as the legislator assesses that there are reasons to normatively lay down the guarantee of the representation of members of the national minorities in the Croatian Parliament.

60. Nevertheless, taking point II of the pronouncement of this decision into account, and also the fact that Article 19 para. 1 CA RNM contains an almost identical provision to that contained in Article 1 para. 1 C(A)A RNM, the principles of the legal certainty, clarity and accessibility of legal norms, which result from the rule of law, require that the entire Article 1 C(A)A RNM is removed from the legal order, including also paragraph 1.

In this framework, removing Article 1 para. 1 C(A)A RNM (which is not in breach of the Constitution) from the legal order as well does not produce any damaging effects because the change which Article 1 para. 1 C(A)A RNM would make to Article 19 para. 1 CA RNM does not affect either the contents or the effect of this rule.

Under these conditions priority may be given to the above requirements resulting from the rule of law and the provision that is in itself not in breach of the Constitution may (also) be removed from the legal order.

VIII. THE CONCLUSIONS OF THE CONSTITUTIONAL COURT

1) Point I of the pronouncement

61. The Constitutional Court has, on the grounds of Article 55 para. 1 of the Constitutional Act, decided as in point I of the pronouncement, having found:

1) that there is an omission in the linguistic structure of Article 1 para. 2 C(A)A RNM ("national minorities which" /in the plural/ … "are guaranteed" at least three parliamentary seats for the members of "that national minority" /in the singular/), which obscures the meaning and thus also the essence of the prescribed legislative measure and opens the possibility of its diverse and even opposite interpretation, thus contravening the requirement with which laws must comply under the rule of law, a highest value of the constitutional order of the Republic of Croatia (Article 3 of the Constitution);

2) that Article 1 para. 2 C(A)A RNM is in breach of Article 1 paras. 2 and 3 of the Constitution, if viewed in the light of equal rights, national equality and the multiparty democratic system, highest values of the constitutional order of the Republic of Croatia (Article 3 of the Constitution). Within the framework of the general electoral system – which is instituted for the execution of the rule of "the people" within the meaning of Article 1 paras. 2 and 3 of the Constitution and is a direct expression of the highest constitutional values mentioned above – constitutional law does not allow the advance guarantee by law of reserved parliamentary seats for any minority on any grounds (national, ethnic, linguistic, sex, age, educational, professional, property etc.);

3) that recognising reserved parliamentary seats for the members of some minorities in the framework of the general electoral system by the nature of things leads to infringing equal suffrage within that system. Reserved parliamentary seats require the prescription of special electoral rules to ensure that the candidates/members of that minority really are elected to those seats at the elections, which presupposes favouring "minority" lists of candidates, and thus also the unequal weight of the votes of voters within the framework of the general electoral system, which the Constitution does not allow (Article 45 para. 1 of the Constitution);

4) that the prior regulation of the mandate (i.e. the scope and content of the representatives' powers and their rights, obligations and responsibilities) of the representatives in Article 15 para. 3 of the Constitution is the constitutional precondition for legally recognising the special voting right of the members of national minorities to elect "their representatives" to the Croatian Parliament. The mandate of the representatives in Article 15 para. 3 of the Constitution must be regulated in an act with constitutional force (the possibility of changing, or amending the Constitution is understandable in itself). The CA RNM does not have the force of the Constitution nor does it regulate the mandate mentioned above. Thus the constitutional preconditions for the application Article 15 para. 3 of the Constitution in electoral practice have not been met;

5) that Article 1 para. 3 C(A)A RNM did not pass the test of justification, which would centre on examining the proportionality of the statutory measure of recognising the right to a supplementary vote at Croatian parliamentary elections for national minorities. This is a right of an exceptional and transitional nature which – in the light of the specific facts and circumstances of national minority representation in the Croatian Parliament in the last three parliamentary elections (2000, 2003 and 2007) – is not likely to ensure a higher degree of the integration of national minorities in political life than that already achieved through the system of reserved parliamentary seats for the minorities before the entry into force of the C(A)A RNM. At the same time, however, this right infringes to a far greater degree on the equality of suffrage than did the statutory measures in force before the entry into force of the C(A)A RNM.; Therefore, the measure in Article 1 para. 3 C(A)A RNM – in the light of the specific circumstances – cannot be found to be proportional. Lacking the explanation of an objective and reasonable justification for the reasons of introducing it, and bearing in mind that the electoral order already contains a system of reserved parliamentary seats for national minority representatives, there are grounds to conclude that the effects of this measure excessively infringe on the equality of suffrage in a democratic society (Article 16 taken with Article 1 para. 1 and Article 45 para. 1 of the Constitution).

6) that there no grounds in constitutional law for the objections of most of the proponents who claim that all the other minorities are granted a supplementary vote at the Croatian parliamentary elections except the Serb minority, because of which this “large-sized” minority is discriminated against with respect to the “small-sized” minorities. Article 15 para. 3 of the Constitution, if it is interpreted in context and teleologically, does not result in an unequivocal conclusion about the constitutional obligation to impose the constitutional command: “either all or none”, as long as granting a supplementary vote to only some, and not to all, national minorities does not produce discriminatory effects against those who were not granted this right;

7) that Article 1 para. 1 C(A)A RNM (“The Republic of Croatia guarantees the members of national minorities the right to representation in the Croatian Parliament”) does not contravene the Constitution, but the reasons of the legal certainty, clarity and accessibility of legal norms demand the removal from the legal order of the entire Article 1 C(A)A RNM, which also includes paragraph 1. This does not terminate the application of the rule in Article 1 para 1 C(A)A RNM because Article 19 para. 1 CA RNM contains the identical rule (see explanation of point II of the pronouncement of this decision).

2) Point II of the pronouncement

62. The Constitutional Court in the first place reiterates that the rules contained in the repealed Article 1 C(A)A RNM were not subject to the obligation of being harmonised with the Constitutional Amendment of 2010. Therefore the deadline in Article 5 of the Constitutional Act in the Implementation of the Constitution of the

Republic of Croatia (*Narodne novine*, no. 121/10) does not apply to them. This article provides: “The laws that regulate the election of representatives to the Croatian Parliament shall be enacted no later than one year before the regular elections for representatives to the Croatian Parliament are held.”

In that sense the Constitutional Court found the following in the Notification on the Application of Article 5 of the Constitutional Act on the Implementation of the Constitution of the Republic of Croatia, no.: U-X-6670/2010 of 8 December 2010 (*Narodne novine*, no. 142/10; hereinafter: Constitution Implementation Act):

> **2.1.** “5.2. ... the obligation ‘to pass a law’ within the meaning of Article 5 of the 2010 Constitution Implementation Act refers only to passing new laws, or to revising and amending the electoral laws currently in force, that are required by the change of electoral rules in the Amendment to the Constitution of the Republic of Croatia (*Narodne novine,* No. 76 of 19 June 2010; hereinafter: the 2010 Constitution). (…).
>
> ... the obligation in Article 5 of the 2010 Constitution Implementation Act, which has to be realised no later than 11 March 2011, relates to those parts of the electoral legislation that have to be harmonised with the new legal rules stipulated in the 2010 Constitution.”

63. Although it is permitted to change the rules contained in the repealed Article 1 C(A)A RNM even after the deadline in Article 5 of the Constitution Implementation Act because they are not rules connected to the Constitutional Amendment from 2010, the breach with the Constitution of Article 1 paras. 2 and 3 C(A)A RNM placed an exceptionally sensitive issue before the Constitutional Court connected to the effects of Article 1 C(A)A RNM losing force several months before the elections for the 7th life of the Croatian Parliament.

The Constitutional Court found that these rules may not be applied at the forthcoming elections, which led to the requirement for Article 1 C(A)A RNM to lose force on the day of the publication of this decision in *Narodne novine*.

This opens up the legal possibility for the Croatian Parliament to enact new provisions regulating the issues in the repealed Article 1 paras. 2 and 3 C(A)A RNM by taking into account the requirements laid down by the Constitution, which are explained in this decision.

However, the requirements of legal certainty, legal assuredness and legal predictability, which result from the rule of law, a highest value of the constitutional order of the Republic of Croatia, direct that if the Croatian Parliament fails to enact new rules before the forthcoming parliamentary elections, the legal rules that will be applied at the elections - instead of the unconstitutional mechanisms contained in Article 1 paras. 2 and 3 C(A)A RNM - must be known on the day of the publication of this decision in *Narodne novine*.

64. Taking the above into account, in this proceeding of constitutional review the Constitutional Court applied Article 31 para. 5 of the Constitutional Act, which provides that “The Constitutional Court may determine the manner in which its decisions shall be executed.”

Therefore, in point II of the pronouncement of this decision the Constitutional Court laid down that in the situation described above the rules which were in force until the enactment of the C(A)A RNM shall be applied, which are contained in Article 19 CA RNM (*Narodne novine*, nos. 155/02, 47/10 – decision and ruling of the Constitutional Court of the Republic of Croatia no.: U-I-1029/2007 etc. of 7 April 2010). It reads as follows:

> "Article 19
>
> '(1) The Republic of Croatia guarantees the members of national minorities rights to representation in the Croatian Parliament.
>
> (2) The members of national minorities elect no less than five and no more than eight of their representatives in special constituencies, in accordance with the law that regulates the election of representatives to the Croatian Parliament, and which cannot decrease the acquired rights of national minorities.
>
> (3) The members of national minorities which participate in the total population of the Republic of Croatia with more than 1.5% are guaranteed no less than one and no more than three parliamentary seats for the members of that national minority, in accordance with the law that regulates the election of representatives to the Croatian Parliament.
>
> (4) The members of national minorities which participate in the total population of the Republic of Croatia with less than 1.5% have the right to elect no less than four representatives who are members of national minorities, in accordance with the law that regulates the election of representatives to the Croatian Parliament."

The application of the above legislative rules does not affect the achieved degree of representation guaranteed to national minority members in the Croatian Parliament, and ensured for them in advance, because Article 1 C(A)A RNM did not change the number of reserved seats for national minorities with respect to the number that was guaranteed in the CA RNM and the Election of Representatives to the Croatian Parliament Act before their amendments of 2010. It is still three reserved parliamentary seats for the Serb minority and a total of five reserved parliamentary seats for the "small-sized" minorities.

3) Point III of the pronouncement

65. The publication of this decision is grounded on Article 29 of the Constitutional Act.

PRESIDENT OF THE COURT

Jasna Omejec, LL D