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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

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

by:

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1. This paper contains certain comments on the Law as adopted by the Croatian Parliament on 6 April 2001, in particular from the perspective of minority protection. The following documents have also been taken into account: the Opinion of the Venice Commission on the Constitutional Law on the Rights of National Minorities in Croatia, adopted on 7 July 2001; the Report of the Congress of Local and Regional Authorities of Europe (CLRAE) on the Local Government Elections in Croatia of 11 June 2001; the Final Report of the Office for Democratic Institutions and Human Rights (ODIHR) on Local Government Elections of 11 July 2001; and the Opinion on Croatia of the Advisory Committee on the Framework Convention for the Protection of National Minorities (Advisory Committee) of 6 April 2001.

A. *Some general comments*

Article 2

2. There is a growing tendency in Europe to grant the right to vote for local representative bodies also to residents who are not citizens of the country concerned, but have had residency there for a considerable period of time. The restriction of the right to vote to Croatian citizens, in the first paragraph of Article 2, deserves reconsideration from that perspective.

3. In relation to minorities, reference is made here to the Opinion of the Venice Commission on the Constitutional Law on the Rights of National Minorities in Croatia (CDL-INF (2001) 14, 12 July 2001 at p. 3), where it is stated that "except in the case of political representation at levels other than the local level, citizenship is generally irrelevant to the content of internationally prescribed minority rights". It further states (at p. 4) that the provision in the Croatian Constitution restricting the right to vote and the right to take part in the conduct of public affairs to citizens "may generate some problems for the effective enjoyment of these rights by persons belonging to minorities who are not, or not yet, citizens of Croatia". This restriction would seem to be the more problematic since the 1991 Law on Citizenship is said to be disadvantageous to those who are not ethnic Croats, while on the other hand ethnic Croats who live outside of Croatia do have the right to vote (see the CLRAE draft Report at p. 5, the ODIHR Final Report at p. 7, and the Opinion of the Advisory Committee § 27).

3. Article 9 of the Law on Voter Registers requires voters to be identified by ethnicity. It is not clear whether that requirement has a legitimate aim, given the fact that there are no separate elections for members of minorities. Since the voter registers are public documents, the requirement may involve a risk for persons belonging to certain minorities (see the Opinion of the Advisory Committee § 19).

4. The requirement of permanent residence in the unit concerned raises the issue of special facilities for displaced persons. In the actual situation in Croatia this appears no longer to be a serious problem. However for displaced persons it remains problematic to change permanent residency (see, with regard to the 2001 local elections, the CLRAE draft Report at pp. 12-13 and the ODIHR Final Report at pp. 8 and 19).

Article 3

5. The article does not contain a provision fixing the regular duration of the term of office of the elected members of representative bodies. The words "in compliance with the law which regulates local and regional self-government" at the end of the fourth paragraph may indicate that this duration will be regulated there. Fixing the duration of the term of office in a uniform way in the present Law would, however, seem to be more appropriate. In that context it is remarkable that Article 7, in its introductory sentence, speaks of "the regular four-year mandate" while the period of four years has not been mentioned in the Law in any preceding provision. Anyway, as it reads, the fourth paragraph creates the impression that the Government of Croatia may to their discretion determine the duration of the term of office by calling new elections.

6. The provision in the fourth paragraph that the term of office of members of representative bodies shall last until the announcement of the decision to call elections or to dissolve a representative body, may have as a result that a rather long period of time lapses between the ending of the term of office of the current members and the official announcement of the results of the new elections, during which period no representative body would be in function. Consideration should be given to either ensuring that the new elections will follow shortly after they have been called or shortly after the dissolution of the representative body, or to inserting a transitional provision to the effect that the term of office of the members will continue until the moment the outcome of the elections is officially announced.

7. The provision of the fifth paragraph, concerning early elections, may have as a result that the term of office of members of representative bodies elected at early elections will only last for a very short time, if the representative body concerned is dissolved shortly before the regular term of office of the members would have ended. Consideration should be given to providing that the duration of the term of office of members of representative bodies elected at early elections will be equal to that of members elected at regular elections.

Article 5

8. In the second paragraph, the President of the Republic is not mentioned as a function that is incompatible with the membership of a representative body, while the Vice-President is mentioned.

Article 7

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

Article 8

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

B. Some comments from the perspective of minority rights

Article 9

11. This provision reflects the principle of proportionality of seats for the majority and the various minorities living in the unit concerned (see also Articles 15, 44 and 132 of the Croatian Constitution).

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

13. The number of seats allocated to the different groups will be determined in the statutes of the local and regional self-government units. However, the composition of the population, and therefore the numerical proportion of the different groups, will be subject to changes. In 2001 there was a census to determine the relevant proportions of groups in local units, but it is unclear on what occasions and how frequently changes in numbers will be taken into account in allocating seats. In addition, the method of determining the size of the different groups is highly disputed, for instance in relation to the position of refugees, displaced persons and Croatian citizens living abroad, while for many persons belonging to a minority it may be problematic to identify themselves as such in a census, especially for Roma, out of fear for discrimination or intimidation (see the ODIHR Final Report at pp. 6-7, and the Opinion of the Advisory Committee § 20).

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

minority do not wish to do so, given the fact that the voting is secret, how could that affect the "share" of that minority?

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

16. Article 61 of the Law, which is part of the interim and final provisions, only relates to the regular elections of 2001 and would, consequently, seem to be of no relevance any longer, unless it will be amended to refer to future elections. Article 61 contains the obligation for proponents of slates to acknowledge the principle of adequate (does that mean proportional?) representation of the minority population. It does not contain any sanction for the situation in which such adequate representation is not "adequately" reflected in the proposed slate (for the rather disturbing figures concerning minority representation on candidate lists, see the ODIHR Final Report at p. 17). Furthermore, Article 61 provides for additional elections in the case that the elections held have not resulted in proportional representation of the national minorities. It is not clarified, however, how such additional elections will be held and who may participate in them; only the minorities which are under-represented? It is also not clear how the results of these additional elections will be combined with the results of the original elections. Will those elected candidates, who were listed last on their respective slates and who do not belong to the national minority concerned, have to resign to make room for candidates of the same slate who belong to the national minority concerned and who have been elected in the additional election? This consequence would amount to disrespect for the mandate given to the former by the voters, and would create a cause for ending a term of office before its expiration that is not listed in Article 7. On the other hand, an *ad hoc* increase of the membership of the elected body to provide seats for the additionally elected members, would also seem problematic and be in violation of the relevant statutes and regulations determining the size of the representative bodies (see also the ODIHR Final Report at p. 6).

Article 11

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

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

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

Article 12

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

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

Article 14

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

Article 15

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

24. The decision of the Constitutional Court that, if a list of candidates is no longer complete due to events other than the decease of a candidate, the list is no longer valid, could amount to a frustration of the right of proportional political participation (also) of national minorities. The Law should be amended to remedy this undesirable effect, for instance by allowing lists of candidates to contain more names than the number of seats available.

Article 17

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

Articles 18 and 19

26. Is there a guarantee of access to the national and local media? And if so, does that mean access to the public media only, or also to the private media? What tools of expression are covered by the notion of "local public information outlets"? Is the guarantee of access "without obstacles" not too absolute? One could think of necessary restrictions as to time and place, and of certain measures necessary to protect public order and to protect the rights and interests of others. Are all forms of access free of charge? What is meant by "under equal conditions"? Is that formal equality or substantive equality proportional to, for instance, the membership of the political party or coalition, or the number of signatures of independent slates? And finally, what sanctions are involved, if access and coverage are not given in conformity with the requirements?

Article 21

27. What are the criteria for determining the amount of the compensation? Is the number of candidates elected a relevant factor? And the amount of membership of a political party? Is the fact taken into account that a political party will have members who pay a contribution, which usually will not be the case for an independent slate? Is there room for "positive discrimination" to enable presumably minorities to participate effectively in the elections?

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

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

Article 23

30. As was observed in relation to Article 9, the text of Article 23 does not seem to take into account the proportionality principle laid down in the former article. The "proportional electoral method" referred to in Article 23 does not seem to relate to the "proportional share" referred to in Article 9.

31. The minimum requirement of 5% of the valid votes, laid down in the fourth paragraph, could mean that a minority is entitled to a "proportional share" only if the electorate belonging to that minority amounts to at least 5% of the total electorate of the unit. This could mean that for certain minorities the threshold is too high so that their right to proportional representation becomes illusory. Is that consequence taken into consideration and accepted? Would that be in accordance with Article 15 of the Constitution and with the text and purpose of Article 21 of the draft Constitutional Law on the Rights of National Minorities in the Republic of Croatia, which aim at ensuring to national minorities on a proportional basis the right to political representation at state and local levels and participation in public affairs? In that same draft Constitutional Law,

in relation to the Croatian Parliament, it is provided for minorities forming less than 4% of the population that together they shall have at least 6 seats (Article 20).

Article 26

32. Since the State Electoral Commission also supervises the work of regional and local electoral commissions, its composition is also relevant for the elections of members of the representative bodies of regional and local units. Paragraph four provides for the extended composition of the State Electoral Commission for the representation of political parties in the Commission, but not for representation of those minorities whose voters are not affiliated with a political party (nor of other voters who support independent slates).

Article 27

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

34. In addition, there should be an express provision that the chairs of the electoral commissions shall be independent and impartial persons.

Articles 28-32

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

Article 34

36. There is no special reference to national minorities as groups which shall have the right to appoint monitors, although national minorities are not necessarily covered by the category of "political parties and voters who proposed the slates" nor by the category of "non-governmental associations". The right of minorities to appoint observers for the elections in those units where their members participate in the elections and are candidates, is a very effective tool to supervise the implementation of their equal right to vote and to proportional political representation.

Article 37

37. The wording of the second paragraph seems to suggest that one can only vote for a slate and not give one's preferential vote to a candidate who is not number one on the list of the slate. Is that what is really meant? Especially if a minority does not participate in the elections with a separate slate but in affiliation with a political party, coalition or independent slate, it is very important for voters belonging to that minority that they may vote for a specific candidate of the slate who belongs to the same minority.

Article 49

38. Among the details to be announced, the ethnicity of the candidates elected is not mentioned. This again indicates that the Law does not seem to provide express guarantees for ensuring proportional political representation of minorities at regional and local level.

Article 52

39. If a certain minority does not participate in the elections as a separate political party or with an independent slate, its right to raise objections with the Constitutional Court concerning irregularities in the candidacy procedure would seem to be insufficiently guaranteed. Such right to raise objections with the Constitutional Court is, however, of vital importance to ensure proportional political representation.

Articles 53-56

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

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

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

Article 61

43. See the observations made in the context of the comments on Article 9.

44. The third paragraph of Article 61 provides for precedence of the statutes of regional and local units over the present Law in the matter of participation of national minority members in

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

C. General conclusion

45. From the above analysis it may be concluded that the Law on the Election of Members of the Representative Bodies of Local and Regional Self-Government Units is unclear on several points, and that the right of minorities to proportional political representation at regional and local level, provided for in Article 21 of the draft Constitutional Law on the Rights of National Minorities in the republic of Croatia, finds insufficient procedural and material guarantees in the Law under consideration. It cannot be said *prima facie* that the resulting limitations of the right to proportional representation have a legitimate purpose and are proportional to the aim pursued, also in an international law perspective.