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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
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**COMMENTS ON THE LAW
ON THE ELECTION OF MEMBERS
OF THE REPRESENTATIVE BODIES
OF LOCAL AND REGIONAL SELF-GOVERNMENT UNITS
OF CROATIA**

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1. Introduction

1. The importance of sub-national elections for the protection of minorities is evident. In a democratic system many policies that are relevant to minorities are devolved to sub-national levels; in countries that have emerged from violent civil wars (like Croatia) the sub-national level presents an arena for the reintegration of former enemies into the political process, their access to resources, and their experimentation with different and democratic modes of decision-making.

2. Institutional strategies that aim to protect minorities rarely rely on the electoral system alone, but are complex packages with executive, legislative and judicial dimensions that are often closely interrelated. The Croatian example clearly demonstrates that the regulation of citizenship, to give an example, is central to the working of the electoral system. The conscious engineering of electoral provisions should keep in mind these limitations and side-effects.

3. The comment of the Croatian *Law on the election of members of the representative bodies of local and regional self-government units* deliberately concentrates on the question of electoral rights and the electoral systems, as these two elements are most relevant in the context of minority representation. Electoral rights define who may participate in elections (2), electoral systems are methods whereby votes are translated into parliamentary seats or into governmental offices (3). The analytic perspective draws from political science, especially from the concepts and insights of international comparative research on electoral politics.

2. The Right to Vote

2.1. General Remarks

4. In Europe the principles of universal, equal, direct and secret suffrage are generally accepted and applied. Any deviation from these international standards does not longer occur, neither at national nor at local elections. The detailed provisions for suffrage are generally determined by three factors: voting age, residence, and nationality.

5. Whereas voting age stands at 18 years in nearly all European countries, there is less homogeneity with regard to the traditional provision that registered voters must have a permanent residency within the relevant electoral constituency. Since the past few years there has been a worldwide tendency to expand the democratic rights of the people by weakening this residency requirement and permitting citizens living abroad to participate in national elections from their foreign place of residence (so-called external voting). Such external voting has been applied for elections to *national* offices, but also criticised due to problems of transparency (organizational aspects), of judicial review (legal aspect), and questions of political representation. From this perspective the right to vote is not simply an individual right, but it contributes to the creation of public institutions. Why should citizens living outside the country keep the right to judge about the composition of representative organs whose decisions are only binding for citizens residing inside the state territory? Only those citizens who bear the consequences of their electoral decisions should be entitled to vote.

This problem of representation is particularly important in those countries with a considerable number of citizens living abroad, as external voters are likely to become crucial for the overall electoral result. It follows that external voting is even more problematic for *local* elections, where a local demos should vote for their representatives who will thus be entitled to decide on matters of crucial importance for the local community.

6. With regard to the third element, the question of nationality, we have, on the contrary, seen an expansion of voting rights that is restricted to local level elections. EU citizens are indeed entitled to register for local elections in other EU member states under the same conditions as its nationals, subject to detailed arrangements which may provide for derogations where warranted by problems specific to that member state. A 1992 Convention of the Council of Europe on the Participation of Foreigners in Public Life at Local Level recommends granting foreigners the right to vote and stand for local elections provided they have been lawfully and regularly resident in the host country during the five years preceding the election.

7. In sum, provisions about electoral rights should take into account different functional demands of national, regional, and local levels. We might add two additional caveats. First, it must be possible to exercise voting rights effectively. Without procedural rules ensuring a fair, legal and transparent organizational context formerly disenfranchised groups will still be hindered from effectively casting their votes or having them counted properly. Second, the political importance of granting voting rights to contested communities is directly linked to the relevance of the decisions that the elected bodies might effectively be able to take. Although the symbolic value of participating in elections should not be underrated, turn-out will always depend on the expectation that representative organs matter for the lives of the voters and replace established modes of decision-making in the local arena (centralist, informal (military), or according to traditional social norms). It is thus certainly much more important to struggle for the suffrage of disenfranchised groups in the context of national elections.

2.2. The Croatian Provisions

8. The Croatian Local Elections Law provides a conventional definition of voting rights. Suffrage is granted to all *Croatian citizens who have turned 18 years of age, and with the permanent residence in the area of the unit for the representative body of which the elections are conducted* (Art. 2, Para 1). No voting rights are granted to resident non-citizens. The analysis of the legal document meant to regulate local and regional elections reveals a high conformity with international practice and no specific discrimination of any minorities.

9. What seems to be problematic is less the wording of the law than (a) the specific political context of the recent elections and the (b) application and interpretation of the terms ‘permanent residence in the area’ within the actual political context. Six years after the end of violent conflict in Croatia the return of Serb refugees, equal opportunity for citizenship rights regardless of ‘nationality’ and the full restoration of property rights continue to be unresolved or only partially resolved issues.

10. The decision of the Constitutional Court from 1999 that allowed ethnic Croats living in Bosnia and Herzegovina and holding dual citizenship to vote for local government elections in Croatia, may be based on relevant provisions in the Constitution but certainly not in the Local Elections Law (that was not even enacted by that time). While there are good reasons to relax the residency requirements for national polls (especially with regard to the importance of minority-sensitive political decisions taken at this level), such arguments hardly exist for local and regional elections. With freedom of movement guaranteed all citizens living currently in or outside the national territory might decide to return to their place of permanent residence until the next local and regional elections of 2005. All others should be barred from influencing the outcome of *local* contests. The difficulties of former Croatian citizens of Serb origin to renew their citizenship and thus their voting rights from their current place of residence, is a problem of citizenship laws, and certainly not an issue to be regulated by electoral legislation.

11. Similarly, organizational obstacles witnessed during the 2001 elections in some polling stations for 'displaced' Serb voters represent a problem in the application of the relevant legislation, not of the legal document itself. As is described in the electoral reports, the specific voting arrangements for displaced persons were not covered in the Election Law. To sum up, the responsibility for these problems and their negative implications for minorities cannot be attributed to the Electoral Law but to ad hoc executive or judicial decisions that deal with the transitory context in 2001.

3. The Electoral System

3.1. Types of Electoral Systems and the Protection of Minorities

12. Any assessment of electoral systems relies on some assumptions that need to be made explicit. The two most fundamental of these assumptions that underlie the following analysis is that a) electoral systems are often powerful levers for shaping the content and practice of political processes, and b) that there is no single electoral system that is likely to be best for the protection of minorities in all countries. In our discussion we also follow the mainstream of international electoral research in arguing that the working of electoral systems at the local level has no inherent logic different from the working of such systems at the national level. The concepts and insights from comparative research on electoral systems that are mainly drawn from national elections are thus relevant for an analysis and engineering of electoral systems at the local level.

13. Most of the thinking about the effects of electoral systems is not particularly interested in the protection of minorities. We should, however, not conclude, that the effects of electoral systems are therefore indifferent to the protection of minorities. Opting for majoritarian, combined or proportional systems (and their sub-types) might have important consequences for the representation of minorities. We distinguish two types of strategies of minority protection through electoral systems design: We might speak of **indirect strategies**, insofar as the electoral system is mainly concerned with satisfying other functional demands

(governmental stability, accountability, proportionality, simplicity) and does not directly address the question of minorities. **Direct strategies**, on the contrary, consciously tackle the question of minority rights within the electoral system.

a) Proportional representation systems (PR) normally facilitate a representative legislature and include all significant social groups in the parliament regardless of the extent or distribution of their support base (which is of central importance within majoritarian systems). The establishment of closed party lists allows like-minded parties to place representatives of minorities high on their party lists. But the huge differences within PR systems should not be neglected. We may have different sizes of constituencies, different forms of lists (blocked or open), and different formulas for converting votes into seats (d'Hondt versus Hare quota) that all have an impact on the chances of minor parties and groups to gain seats. There can be a multiplicity of ways in which these elements are combined. Especially the size of constituencies is an important variable. Small multi-member constituencies create de facto thresholds of representation that reach sometimes much beyond the legal thresholds applied via electoral laws. The smaller the constituency is, the smaller is the probability that a (proportional) representation of minorities will be achieved. In elections to small local councils with only seven to ten seats, minor parties need to obtain between eight and 12 percent of valid votes in order to get elected.

b) Research on electoral systems in divided societies has identified the so-called *Alternative Vote (AV)* electoral system as a promising strategy to counter extremism and conflict behaviour. AV is a majority system where voters are required to declare not only their first choice of candidate on a ballot, but also their second, third, and subsequent choices amongst all candidates standing. Candidates who wish to maximise their electoral prospects have thus a strong incentive to garner for the second preferences of voters from other (minority) groups. AV is a personality-centred system, needs single or very small multi-member constituencies, and has never been applied in local elections, to the knowledge of this author.

14. **Direct strategies**, on the contrary, explicitly recognize the presence of contending ethnic, religious groups or races within the electoral system. In most of these cases the representation and the ratio of different groups in the representative bodies is fixed before the elections. We might distinguish two basic options:

a) Separate electoral rolls: Each defined group/minority has its own electoral roll, and elects only members of its own group to parliament. The entire system of parliamentary representation might thus be divided on a communal basis (like in the Fiji Islands), or, in the case of national minorities, separate rolls are established exclusively for the members of specific ethnic or religious groups. One example is the optional separate roll for Maori voters in New Zealand. Maori electors can choose to be on either the national electoral roll or a specific Maori roll, which elects five Maori MPs to Parliament.

b) Quota systems: Different models operate at the level of candidature, with one single electoral roll at the voter level. Here the number of seats attributed to each group or minority

might be fixed before the election, but members for parliament are still elected by all voters. This system operates in Lebanon at the national level, but countries as diverse as Jordan, India, Colombia or Taiwan provide for reserved seats as a way of ensuring the representation of selected minority groups. In the specific model of Mauritius, quotas are not fixed, and best loser seats are allocated to the highest polling candidates of under-represented ethnic groups in order to balance ethnic under-representation resulting from an unrestricted electoral competition.

3.2. Mechanical and Psychological Effects of Electoral Systems

15. There are two types of effects a electoral system may have: a mechanical (technical) effect (which is inherent in the procedure of translating votes into seats) and a psychological effect (which regards the specific incentives a electoral system may create for candidates and electors).

16. The *mechanical* effect is easily described: With exactly the same number of votes for parties, one system might lead to the representation of minority parties in councils and parliaments and another system to a single party assuming majority control of parliament / government. It is possibly to re-run elections under different electoral formulas (plurality versus proportional representation) in order to verify these mechanical effects.

17. The *psychological* effect is related to the impact of the system on the decisions of candidates and voters. It is much more difficult to describe or to evaluate, as we cannot measure the psychological effect or the incentives that a specific system provides. Electoral systems may reward particular types of behaviour and place constraints on others. A minor party which runs the risk of not being able to obtain the share of votes required by a legal threshold is impeded by the latter not only de facto but also psychologically: the voters may be afraid of losing their votes and consequently they vote for another party.

18. Both the mechanical and the psychological effects of electoral systems are interrelated with two main contextual factors specific to the country concerned, i.e. (a) the nature of group identity and the demographic and geographic distribution of minorities, and (b) the intensity of conflict and the stage of post-conflict democratisation. The first variable asks for the foundations and the degree of malleability of ethnic identities (i.e. how rigid and fixed). It also takes into account the spatial distribution, the relative size, number, and degree of geographic concentration or dispersion of minorities. The second factor regards simply the intensity and depth of hostility between the competing groups, and the presence and acceptance of accompanying accommodative institutions within the political process (outside the electoral system). The *design of electoral systems*, i.e. the policy of conscious manipulation of rules in order to produce specific outcomes (say proportional representation of minorities), should without any doubt be highly sensitive to these contexts.

19. As a preliminary conclusion we might thus consider likely impacts of the aforementioned electoral systems on minority protection. *PR list systems* tend to be strong on the mechanical side, i.e. in delivering a highly accurate representation of all groups and

minorities (at least in so far as they organize politically). Of course, the inclusionary character of the system hinges upon the size of the constituencies. On the negative side, as it is easy to mobilize support by playing the ethnic card, major parties may have every incentive to emphasize ethnic issues and appeals. PR is thus weak on the incentive structure. It needs accommodative elites, because voters are not induced to look across the ethnic boundaries. *Alternative vote* is a system which is less concerned with proportional results and places more emphasis on the need to force different groups to work together. The single most important condition for a success of this electoral system is that there are several ethnic groups competing in a constituency. Where a candidate is confident of achieving an absolute majority of first preferences due to the domination of his or her own ethnic group in an area (say over 50%), they need look no further to win a seat.

20. *Direct* strategies such as quota systems or separate rolls are certainly the strongest on the mechanical side, insofar as the numerical representation of minorities is assured a priori, i.e. before the elections. Such systems have, however, no incentive to ethnic accommodation, tend to reinforce the formation of minoritarian political parties. Candidates have no incentive to attract also votes from other ethnic or religious communities. Quota systems are not aimed at overcoming ethnic differences but at reflecting openly and assuring the representation of minorities. Such electoral formulas should thus be preferred only when neither elites nor the voters are likely to display moderation on their own, i.e. whenever political mistrust in the aftermath of violent conflict is high, or religious cleavages politicised and deep-seated.

3.3. Analysis of the Croatian provisions

21. The electoral system is laid down in the articles 11-24 of the Local Elections Law. It provides for a system of proportional representation (PR) with blocked lists in a single constituency at the level of each local and regional self-government unit. The number of seats to be distributed in each unit is stipulated by the unit's statute. A 5-% threshold is applied for all elections. Although the provisions in Art. 23 of the Electoral Law are very misleading (providing literally for two different and mutually excluding seat distribution formulas), it seems that in practice d'Hondt method was used for the calculation of seat distribution. The mayor is not elected by the population, but by the elected representatives of the local council. The mode of his/her indirect election is not regulated in the Local Elections Law.

22. As argued above, PR systems are generally considered to be favourable to the interests of politically organized minorities. While the option of the Croatian legislators for such a system is thus generally positive from the perspective of minority protection, it is less with regard to the 5% threshold. The intention of the threshold is always that of excluding small political parties from the representative body and promoting the concentration of the local party system. It never serves the interests of minorities. While the small size of many constituencies renders superfluous the application of the legal threshold (de facto thresholds caused by the magnitude of the electoral districts being of greater significance than the legal hurdle), there is no reason to introduce such thresholds in the larger constituencies when the format of local party systems and the number of contenders is unknown (and the Electoral Law is concerned with proportional representation of minorities in other provisions).

23. Two articles in the Electoral Law deal explicitly with the representation of minorities. According to Art. 9 the *statutes of local and regional self-government units shall determine the number of members of representative bodies from among the Croatian citizens, members of ethnic and national communities or minorities, in accordance with the proportional share of their members in the total population of the unit.* When proposing their slates of candidates, parties are obliged according to Art. 15 to give the names, *ethnicity*, addresses and personal identification numbers of *candidates*. In combination with the PR electoral system in a single constituency this provision signifies that all parties need to take into account the ethnic quotas determined by their self-government unit when compiling their slate. How exactly this could be made is not explained in the Electoral Law. Art. 11 para 3 mentions only the obligation to take care of the principle of gender equality, but is silent on ethnic proportionality. Even those parties that might be seriously committed in presenting such proportional slates would not be able to guarantee any proportionality in the outcome, as the overall composition of the council is the result of the winning candidates of different party lists (and not different ethnic lists).

24. Art. 23 points out: *All voters having permanent residence in the area of that unit who come to the polls, shall elect, on the basis of the slates of candidates, all members of the unit's representative body.* This provision excludes any separate voter rolls or ethnic representatives elected by the voters of their group exclusively. If we take the letter of the legal provision we have thus an electoral system limited at using direct and explicit strategies to protect minorities by reserving quotas at the level of candidature without however assuring proportional outcomes. At the same time, all parties proposing candidates are obliged to present mixed slates of candidates and the system thus includes a major incentive for inter-ethnic coalition building. Without any clear provision about the ranking of candidates within the slates, the necessity to include proportionally representatives of minorities does indeed not guarantee their election to the local and regional councils.

25. There exist two solutions to address this problem. The first solution would remain within the overall logic of the electoral system by providing for **best loser seats** according to the Mauritius model. If the electoral outcome did not reflect the established quotas, the lowest-ranked winners according to the d'Hondt formula were to be substituted by the best-placed minority candidates from the same lists. The second option would be to shift to a majoritarian electoral system with **open party lists** (and possibly multiple voting) where voters cast their votes for single candidates on the lists, and the seats would be distributed to the candidates obtaining the highest number of votes taking into account the agreed seat ratio between the different groups (Lebanese model).

26. The application of all such systems, however, has inevitably two drawbacks, as first someone has to decide on the quotas, and second due to migration and demographic change the population ratios of different groups may shift and the quotas need to be revised regularly. The Croatian Local Electoral Law has opted here for a less fortunate solution in giving the local and regional self-government units the autonomy to fix the quotas. It is true that the interim provision of Art. 61 (that will be analysed in detail below) with its mentioning of the

census results indicates that the local and regional bodies will have a limited autonomy in interpreting the proportional shares of their minorities. But it would seem much wiser to confer these competencies to an independent commission that is established before each local/ regional election, composed of parliamentarians and/or representatives of minorities, that decides on the basis of the census results and, if necessary, additional evidence.

27. The difficulties encountered during the 2001 elections are a perfect illustration of these dilemmas. As the Electoral Law was prepared just in time before the elections, the electoral system did not work as described above. Art. 61 states that *at the regular elections 2001, the proponents of slates shall, while compiling the slates, acknowledge the principle of the adequate representation of the minority population, taking into account the local circumstances*. The Law additionally provides for by-elections to be held within 90 days after the results of the 2001 census are published in order to correct eventual under-representation of minorities. It has been pointed out in detail in the OSCE report that these provisions lack specific operational rules how exactly to organize such by-elections. And it remains to be seen to what extent such by-elections will ever be held, if the results of the census are published.

28. The Croatian legislator has made it clear that the census should serve as a basis for the definition of quotas and reserved seats. At the same time the census has reserved to citizens the right to declare or not to declare their allegiance to a 'nationality'. The proportional quotas will therefore reflect only the figures of the declared adherents of such minorities. But there are certainly no better definitional criteria than self-ascription. Such dilemmas are aggravated by the specific refugee context of Croatia with a number of would-be citizens of Serb origin that may be hindered from applying for citizenship (and consequently to increase the minority quotas within their original places of residence), and data on Croatian citizens who have never lived in Croatia that may artificially blow up quotas of ethnic Croatians within contested constituencies. Electoral provisions can't offer any short-cut to the resolution of these problems. If the decision is taken to explicitly reserve quotas within the electoral system there is also a need for definitional criteria, and the census is certainly the most objective one available. As minority representatives have already raised scepticism with regard to the reliability of the census results, the definition of quotas for the 2005 elections should take into account (as proposed above) additional evidence or data. Whatever data are used to calculate proportional quotas for minorities, the ethnic identification of voters will not always remain a secret, especially in the smaller local constituencies even without formal identification in the voters' registers.

29. The explicit reservation of seat contingents for minorities should always be the strategy of last resort if anything else fails. It may temporarily be the adequate policy in a country still marked by civil war and refugees. To rely on the free democratic competition is in the medium- to long-term a much better strategy, and it avoids the politically sensitive issues of searching objective criteria and obliging citizens to define their ethnic identity in an either-or way that may no longer reflect the social realities in the country. Finally, we have a number of local contexts where the minorities are not really minoritarian. The Electoral Law

even includes a special clause that somehow ‘protects’ ethnic Croatian interests by assuring proportional representation in those units *in which members of ethnic and national communities or minorities comprise the majority of population* (Art. 9 para 2). As far as minorities are regionally concentrated (like the Italians) they might indeed not need any assured proportional representation in local councils because they would automatically be relative strong contenders in those localities where they live.

4. Preliminary Conclusions

30. Our analysis of the Croatian Local Electoral Law leads to a somewhat puzzling conclusion. The *regular* and the *interim* provisions of the Electoral Law need to be analytically distinguished. The *regular* provisions represent with some minor exceptions, a valuable approach, but need specification in the perspective of the forthcoming 2005 elections. The late adoption of the Law led to a situation where a number of minority-relevant provisions could not be implemented, but it is beyond the competence of this author to evaluate to what extent this lacuna results from the difficult organizational contexts or a lack of political will to guarantee the fair representation of minorities within elected local and regional institutions.

31. Although the electoral system provided for in the Law if implemented (and complemented by additional provisions like the two options presented above) could offer good prospects for ethnic conciliation, the obligation to present mixed lists in the local and regional contexts is without any doubt a very strong form of electoral engineering that relies most probably on some elementary social pre-conditions. Without any political will to calculate quotas and establish mixed lists such an ambiguous electoral system might also produce counter-productive effects. The only remaining alternative is then the establishment of separate rolls, i.e. separate elections for minorities by minorities.

32. Finally, there is certainly a need to improve the coherence of the different constitutional and legal provisions that regulate citizenship and electoral contests. The consistent definition of ethnic groups and minorities that are entitled to be represented is a particular urgent case. One should, however, not think that a complete harmonization of electoral regimes between the different territorial levels will serve best the interests of the minorities, nor the principles of democratic representation in general. Whereas minorities need a formal and strong protection at the national level, minorities operate in different circumstances at lower territorial levels, and might benefit from less rigid and formalized proportional rules. A consequent policy of fair representation needs to also tackle the question of proportional access to public office at the local level which necessarily goes beyond legislative institutions. And while there are good reasons to allow external votes for national elections, we can’t see any in the case of local and regional elections.