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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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## **I. General remarks**

1. In the first place, attention should be drawn to certain general premises, both of a political as well as a legal character, which in my view lay at the basis of the preparation of this law [the Local Election] in this particular form.

2. There is no doubt that political considerations have played an essential role in the formulation of individual regulations of the law [Local Election Law], especially in the context of guaranteeing minority rights. That is clearly indicated by the complex, many-year-long discussion surrounding changes of the Constitutional Law of 1991 on human rights and freedoms and rights of ethnic minorities in the Republic of Croatia as well as by the preparation of new legislation in this area [compare Opinion on the Constitutional Law on the rights on national minorities in Croatia, adopted by the Venice Commission at its 47th Plenary Meeting, 6-7 July 2001]. I believe that the experiences connected in particular with the preparation of a new minority-rights law may lead one to conclude that certain minority-related matters had consciously not been precisely regulated in the election law. There had been no intention to ultimately resolve and close certain issues. Instead they were left open in the assumption that they would be verified in practice and concretely resolved in the event that a conflict erupted or objections were raised in the course of elections. The proximity of the census and local-council elections also appears to point to such a political intention. One may assume that in its political evaluation the law was to play the role of a kind of verifier of minority problems in individual districts of the country. Only such an assumption can justify the incompleteness of this law.

3. The situation is additionally complicated by the fact that the law (Local Election Law) is the most important if not the only law pertaining to local government elections. Apart from it, there exist a number of laws dating from different periods which also must be taken into account when elections are held. Apart from the Constitution of Croatia constituting the bases of all laws, mention should be made in particular of: the Law on Citizenship, the Law on Voter Lists [1992]; the Law on Local Self-Government and Administration; and the Law on Political Parties. The Law on Election Rights does not constitute any cohesive 'code of local government elections'. That is probably the reason for the gaps and incomplete regulations contained therein. The law-giver must have most likely deemed it unwarranted to regulate the totality of election-related issues in a single law, preferring to approach all the binding laws as complementary. But even a cursory evaluation of that approach (if such indeed had been the deliberate intent of the legislator) evokes a number of reservations. In the first place, the current law is a new one, drafted in completely changed political and legal circumstances than those mentioned above. For that reason, the solutions, especially certain concepts and definitions contained in various laws, are not always coherent (including the concept of minority so essential to our opinion.) The law does not define the concept of a minority, nor does it create a list of minorities -- a solution deserving of high marks. At the same time, other basic doubts arise regarding which laws are to be invoked when defining minorities. The new law on minority rights is, after all, still in the draft phase. For that reason, the incompleteness of the regulations in the present law, regardless of its political intent, must evoke legal doubts. Binding laws provide no answer to many other doubts surrounding the election process. A number of such problems have been raised in the OSCE opinion which formulated questions to which existing law as such, no the election law alone, had no answer. [Compare OSCE, Republic of Croatia, Local Government Elections 20 May 2001, Final Report, p. 6].

4. The date this law went into effect, very close to election day, has raised numerous doubts in terms of guaranteeing electoral rights [especially those of different nationalities]. The issue of the proper *vacatio legis* is one of the key principles of a law-abiding state. Its significance has been emphasised by both scholarly literature as well as courtroom practice. It should be noted that an election law is a special kind of law which requires a longer *vacatio legis* owing to the very nature of electoral procedures. Too brief a period between the time the law goes into effect and the actual voting does not provide sufficient guarantees for preparing and holding elections. That is particularly important amid Croatia's complicated nationality situation, unresolved problems of the citizenship law, a lack of clarity as to what individual categories of people can take part in the elections, create ballots and vote. All that requires particularly careful preparations and, above all, it requires time. Otherwise it creates the basis of manipulation with regards to smaller or more poorly organised groups. That aspect of the law, which may be regarded as formal, does not pertain to its content, but owing to its guaranteeing character has been criticised in all submitted opinions [compare for instance the OSCE Final Report *op. cit.* p-3-5].

5. All those general remarks would indicate that the law now under analysis should be regarded as a periodic law which in its present forms should apply to only one election, even though such had not been the intent when it was being drafted.

## II. Detailed remarks

6. Acceptance of the principle at proportionally is correct, because unlike the majority principle it favours smaller groups and is therefore more advantageous to minorities. However, the way it has been approached in the law under discussion raises doubts. Its principles are imprecise. As the OSCE opinion has stated: 'The principle for minority representation is therefore articulated in the Election Law, but the procedures for the implementation of the principle are not fully addressed.' The reservations are of two types. The first pertains to concepts used in the law, the second involves the principle's implementation. As regards the first reservation, it applies in particular to the comparison of articles 9 and 61. Article 9 states that 'statutes of local and regional self-government units shall determine the number of members of representative bodies from amongst Croatian citizens, members of ethnic and national communities or minorities, in accordance with the **proportional** share of their members in the total population of the unit.' But article 61 uses the terms 'the principle of **adequate** representation'. The question arises as to there different degrees of representation are meant. Does article 61 soften the criteria arising out of article 9 to the disadvantage of minorities? It would be difficult to find an answer to that question in the law itself. The doubts are all the greater, since there is no other law that might precisely regulate those questions. It is true that the Constitutional Law on the rights on national minorities has not yet become binding. However, extensive consultations on the draft of that law have been held. During those discussions its highly framework-like character was criticised [by *ia* experts of the Venice Commission]. In response to that objection came the explanation that the constitutional law was intended to provide a general framework to be filled in with other specific laws. That is how article 13 of the Draft Constitutional Law should be understood when it states: 'Members of national minorities shall, along with the general and equal right to vote for members of representative bodies of the local and regional self-government units, have the right to elect a certain number of members of representative bodies in proportion to the percentage they make up within the total population of the unit, in accordance with a special law and statute.' Without a doubt, the law currently under analysis

is just such a special law. And it should therefore be filled with unequivocally precise and exhaustive content that leaves no room for doubt as to the scope of the principle of proportionality. Not every law can or should be a legislative framework.

7. The question also arises whether the d'Hondt method of counting votes is the best way which most effectively guarantees minority rights. In general, that method of vote counting combined with the 5% clause gives preferential treatment to larger groupings.

8. Another problem evoking doubts is the way the names of candidates are arranged on the ballot and the resultant manner of voting for a slate of candidates. The solutions of the current law contain pitfalls that could adversely effect the implementation of minority rights. Article 15 of the law accepts the principle that there can be as many names on the ballot as there are vacancies to be filled in the body to be elected. But it provides no mechanism for filling a vacancy in the event a candidate gets disqualified. Because of the lack of legislative solutions, the Constitutional Court ruled that in such a case the entire slate must be disqualified. That solution is obviously disadvantageous for every political grouping. In the case of minorities, it has an especially negative dimension since it can bring about the elimination of a minority slate, thereby completely violating the principle of proportionality defined in article 9. Imprecisely formulated provisions of the law therefore lead to internally contradictory principles within the framework of a single law. That shortcoming of the law must be eliminated. That may be accomplished either by requiring the number of candidates on a ballot to exceed the number of vacancies or by adopting a slate-supplementation procedure that would prevent elimination of the entire slate.

9. Much discussion has been evoked by the manner of list voting. In that regard, Croatia is not alone. In all countries adopting new election laws disputes have erupted over whether to introduce a system allowing preferential voting within the confines of a list by indicating a concrete candidate or by voting for the leader of the slate. Different arguments favour each of those alternatives, and neither oversteps the bounds of democratic standards. The Croatian election law has adopted the method of voting for the party leader and does not allow preferential voting within the limits of the slate. That solution undoubtedly strengthens individual parties, especially the party leader, who has a decisive say in how the names of candidates are arranged on a slate. The order in which candidates are listed determines who gets elected. The electorate exerts a smaller influence on the concrete personal composition of a given representative body. That manner of drawing up slates and voting leads to the greater consolidation of candidates during the election campaign and rules out conducting one's own campaign against candidates on the same slate which is the case when preferential voting for individual candidates take place. But that voting method may, however, disrupt the principle of proportionality. It may be guaranteed at the time the slate is being drawn up, but because a candidate may not be elected owing to his position on the slate, the principle of proportionality may not get implemented. For that reason, such a solution appears to be inferior in terms of guaranteeing minority rights. At the same time, in view of what has been already mentioned above, the adoption of another solution, ie voting for a concrete candidate other than the list leader in Croatia's concrete situation might not produce positive results where the solution of nationality problems is concerned. Such a solution could, on the one hand, evoke the general fear of including a minority candidate on a 'general' party slate rather than a minority slate. On the other hand, the inclusion of such a candidate thereon might cause strains as a result of a kind of an internal campaign including nationality appeals within the bounds of a given slate, thereby exacerbating or unleashing hidden tensions. It should be emphasised, however, that in the pursuit of legal solutions from amongst existing

possibilities, those which are less likely to trigger conflicts should be promoted. Therefore, even if voting for an indicated candidate would appear to constitute a better safeguard of minority rights, I do not believe that is always the rule. Depending on a given district's nationality cross-section, that may be disadvantageous to a minority candidate. On the other hand, according the minority candidate a high rank on a general ballot, when the principle of voting for the leader is in force, gives him a greater chance of being elected on condition that the slate garners enough votes to achieve the 5% threshold. It therefore appears that the adopted solution, despite numerous misgivings, is probably the better solution in Croatia's concrete situation.

10. An exceptionally important problem, to which the proper importance is not always attached, especially in what are known as the new democracies, is the issue of compensating campaign costs -- a problem dealt with in article 21. That provision, however, is exceedingly general. Obviously, the manner in which political parties are financed has generated heated disputes in individual countries. The basic problem boils down to whether the state is to finance political parties or whether they should be left entirely to their own resources. Various arguments favour this or that alternative. The law under analysis has opted for a solution whereby the state provides compensation for elections. Political parties and leaders of independent slates, who gain a minimum of one member in a representative body at the elections, shall be entitled to the compensation of electoral campaign expenses. But the details have been left to the government's discretion. That is a bad solution. One thing is certain: regardless of which system is chosen, it must be precisely defined in the election law or possibly in the law on political parties. In this concrete instance, the new election law has afforded such an opportunity. But that opportunity has not been tapped, and that constitutes a major shortcoming of this law. Leaving the matter entirely up to the government without any clearly legislated rules always spawns the threat of corruption. Historical examples of such phenomena have been in no short supply. Hence, that is one of the more serious defects of this law.

11. The nationality situation in Croatia continues to be in a state of flux. The present law therefore would seem to constitute a certain framework which should be imbued with precise substance before the next election takes place. And I wish to reiterate that the present law should be exclusively treated as a periodic piece of legislation, constituting the legal basis of elections that have already taken place. But a new law should definitely be adopted at the proper time and with the proper *vacatio legis* before the next election is held.