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OPINION

**ON THE ELECTORAL LAW
OF
BOSNIA AND HERZEGOVINA**

**Adopted by the Venice Commission
at its 48th Plenary Meeting,
(Venice, 19-20 October 2001)**

Based on comments by:

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Introduction

1. On 28 June 2001 the Legal Affairs Committee of the Parliamentary Assembly asked the Venice Commission for an opinion on the draft election law currently under discussion in Bosnia and Herzegovina (BiH). On 21 and 23 August 2001 the Parliamentary Assembly of BiH adopted the Election Law of Bosnia and Herzegovina. Following the adoption of the Law the Secretariat of the Legal Affairs Committee confirmed to the Venice Commission that the Committee wished to receive an opinion on the text adopted, with a view to preparing the decision of the Assembly on commitments to be entered into by BiH upon accession to the Council of Europe.

2. The request therefore has to be understood in the framework of the accession procedure of BiH to the Council of Europe. The Council of Europe made the adoption of an election law a condition for the accession of BiH to the Organisation. The Council of Europe considered that a normal functioning of the democratic institutions in BiH could not be expected if parliament was not even able to adopt an election law.

3. However, certain political forces in BiH contested the draft election law prepared mainly by OSCE as discriminatory and in contradiction with Council of Europe and other international standards. OSCE considered that there was no alternative solution for the contested provisions since these provisions precisely reflect the provisions of the BiH Constitution.

4. This impasse led to an initial rejection of the draft election law within the Parliamentary Assembly of BiH in June 2001. Since this development put into jeopardy the accession of BiH to the Council of Europe, the Secretary General of the Council of Europe, in a letter dated 3 July 2001, urged the leaders of the parties opposing the draft to reconsider their position. He furthermore suggested deleting from the draft the provisions on the election of the House of Peoples of the State of Bosnia and Herzegovina. These appeared particularly problematic and did not seem a necessary part of the law. In addition, referring to the commitments to be entered into by BiH upon accession to the Council of Europe, the Secretary General added that "I will urge to include in the list of these commitments that the rules on elections and the composition of the institutions have to be harmonised with Council of Europe standards on the basis of opinions to be provided by the Venice Commission".

5. In this context the Venice Commission sees as its present task not to provide a comprehensive technical assessment of the electoral law but to examine whether some of the electoral rules are inconsistent with Council of Europe and international standards. Other, more technical, aspects will only be briefly mentioned at the end of the opinion (paragraphs 29 to 31).

The standards to be applied

6. The provisions of the Election Law have to be examined before the background of Council of Europe and other international standards of equality, non-discrimination and participation in public affairs. It should be noted in this context that not only are all these standards already part of the applicable law in BiH but that the Constitution of BiH gives constitutional rank to the pertinent international human rights agreements. This corresponds to the general orientation of the BiH Constitution as stated forcefully in its Article II.1:

“Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms.”

7. Article II.2 of the Constitution gives priority to the European Convention on Human Rights (ECHR) and its Protocols with respect to all other law:

“International Standards. The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law.”

8. Article II.4 of the Constitution contains very strong language on non-discrimination and grants constitutional rank to other international human rights agreements.

“Non-Discrimination. The enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex 1 to this Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

Not less than fifteen international human rights agreements are listed in this Annex, including the International Convention on the Elimination of all Forms of Racial Discrimination, the International Covenant on Civil and Political Rights (ICCPR) and the Optional Protocols thereto and the Framework Convention for the Protection of National Minorities. These international instruments contain a number of provisions on non-discrimination and on democratic elections. Reference is made here in particular to Article 3 of the First Protocol to the ECHR, Article 14 of the ECHR, Protocol No. 12 to the ECHR (not yet in force), Article 25 of the ICCPR, Articles 3 and 4 of the Framework Convention and Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination.

9. The Commission, as a non-judicial body, does not wish to enter into a detailed interpretation of specific provisions of the international agreements. This should be left to future decisions of the competent bodies. Following ratification of the ECHR in particular the European Court of Human Rights may well have to decide on the compatibility of the Election Law with the ECHR. There are also a number of technical differences and problems specific to each provision. For example, Article 3 of the First Protocol to the ECHR applies to legislative bodies only and Protocol Number Twelve was adopted after the BiH Constitution and has not yet entered into force. There can nevertheless be no doubt that the combined result of these provisions is that all citizens, irrespective of ethnicity, must have an equal right to vote in and stand as candidates for elections. The most comprehensive text is probably Article 25 of the ICCPR:

“Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2¹ and without unreasonable restrictions:

- 1. To take part in the conduct of public affairs, directly or through freely chosen representatives;*
- 2. To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;*
- 3. To have access, on general terms of equality, to public service in his country.”*

While this text appears broader than that of the ECHR, it should be noted that the latter clearly provides (Art. 53) that “Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.” Furthermore, among the three core values upheld by the Council of Europe is respect for the rule of law. An essential part of states’ observance of the rule of law is their respect of the international agreements to which they are parties. The Commission will examine the most important provisions of the Election Law in accordance with these standards, and in particular whether the provisions in question guarantee an equal right to vote and stand for election.

Elections which appear unproblematic from the point of view of international standards

10. The provisions in the Law for a number of elections make no ethnic distinctions among voters or candidates and do not seem to present any problems of principle from the point of view of domestic or international human rights standards. This concerns:

- Subchapter 11.B on elections to the House of Representatives of the Parliamentary Assembly of BiH;
- Chapter 12 on elections to the House of Representatives of the Federation of Bosnia and Herzegovina;
- Chapter 13 on elections to the National Assembly of Republika Srpska;
- Chapter 14 on elections to Cantonal Assemblies, Municipal Councils/ Assemblies, and City Councils/ Assemblies.

Elections not covered by the Election Law

11. The Election Law of BiH provides for detailed and comprehensive general rules applicable to all elections in BiH as well as for rules applicable to specific elections at the State, Entity, cantonal and municipal level. With respect to the Entity level, some elections are however omitted pending a harmonisation of the Constitutions of the Entities with the Decision of the Constitutional Court of BiH on the issue of the constituent peoples

¹ Article 2.1 : “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

(CDL(2000)81). With respect to the institutions affected, Article 18.12 of the Transitional and Final Provisions provides:

“The provisions regulating the election of the President and Vice President of the Republika Srpska, President and Vice President of the Federation of Bosnia and Herzegovina, and the election of the delegates to the House of Peoples of Bosnia and Herzegovina, shall be adopted by Parliamentary Assembly of Bosnia and Herzegovina, after completion of harmonisation of the entity constitutions with the Constitution of Bosnia and Herzegovina, pursuant to the decision of the Constitutional Court of Bosnia and Herzegovina.”

12. The Venice Commission has already adopted an opinion on the implementation of the decision of the Constitutional Court (CDL-INF(2001)6) and representatives of the Commission participated in an International Task Force which made proposals for the implementation of the decision (CDL(2001)23). The present rules in the Constitution of the Federation of Bosnia and Herzegovina on the election of the Federation House of Peoples and the Federation President and Vice President provide for a privileged position of two of the three constituent peoples of BiH, the Bosniacs and Croats, in these elections and are therefore indeed incompatible with the reasoning in the decision of the Constitutional Court which requires an equal status of all three constituent peoples throughout BiH (see in particular paragraphs 50-74 and 125-126). It appears fully justified to wait with the introduction of new electoral rules for the revision of the Constitution of the Federation. While there is no necessary legal link between the decision of the Court and the election of the President and Vice President of Republika Srpska, a parallel approach to these institutions would appear justified.

13. While it seems appropriate to postpone the adoption of the respective electoral rules pending the adoption of the amendments to the Federation Constitution required by the decision of the Constitutional Court, the Commission wishes to draw attention to the need to finally implement the decision of the Constitutional Court. This decision brings BiH closer to Council of Europe standards and appears of decisive importance for the future functioning of the institutions in BiH.

Other elections

14. There remain two elections for which ethnic references are made in the Law:
- The elections to the Presidency of BiH in Chapter 8 where ethnic references, based on Article V of the Constitution of BiH, are made in the text of the Election Law;
 - The elections to the House of Peoples of BiH where Subchapter 11.A and Article 18.16 of the Election Law refer to the provisions of the BiH Constitution:
“Until the final regulation of the procedure for the election of the delegates to the Parliamentary Assembly of BiH, their election shall be conducted in accordance with the Constitution of BiH.”

Though both the above sets of provisions use ethnic references, it may be observed as a preliminary remark that the terms Bosniac, Croat and Serb, used throughout the relevant texts, may be more flexible than they appear, as there is no constitutional or legal definition of who is a Bosniac, Croat or Serb. Current electoral rules simply require electoral candidates to make a declaration as to their ethnicity.

The BiH Presidency

15. According to the Election Law, which in this respect faithfully reflects the provisions of the Constitution, the Presidency is elected as follows:

- There are three members of the Presidency, one for each of the three constituent peoples; no member of the Presidency may be a citizen not belonging to one of the constituent peoples.
- The Bosniac and Croat members may be elected only from the territory of the Federation of Bosnia and Herzegovina and by the voters registered to vote there, the Serb member only from the territory of the Republika Srpska by the voters registered to vote there. Therefore the choice of voters is limited, as potential candidates may be prevented from running for elections simply because they do not identify themselves as members of the constituent peoples entitled to stand for election in the Entity where they live.

16. In a federal State it appears unobjectionable that officeholders be elected in a way ensuring representation of the entities with the bigger entity being better represented. In principle, in a multi-ethnic State such as Bosnia it appears also legitimate to ensure that a State organ reflects the multiethnic character of society. The problem is however the way in which the territorial and the ethnic principle are combined. The Constitutional Court of BiH referred to this problem in the following terms in its decision concerning constituent peoples in the Entity constitutions:

“65. A strict identification of territory and certain ethnically defined members of common institutions in order to represent certain constituent peoples is not even true for the rules on the Presidency composition as laid down in Article V, first paragraph: “The Presidency of Bosnia and Herzegovina shall consist of three Members: one Bosniac and one Croat, each directly elected from the territory of the Federation, and one Serb directly elected from the territory of Republika Srpska.” One must not forget that the Serb member of the Presidency, for instance, is not only elected by voters of Serb ethnic origin, but by all citizens of Republika Srpska with or without a specific ethnic affiliation. He thus represents neither Republika Srpska as an entity nor the Serb people only, but all the citizens of the electoral unit Republika Srpska. And the same is true for the Bosniac and Croat Members to be elected from the Federation.”

17. If the members of the Presidency elected from an Entity represent all citizens residing in this Entity and not a specific people, it is difficult to justify that they must identify themselves as belonging to a specific people. Such a rule seems to assume that only members of a particular ethnicity can be regarded as fully loyal citizens of the Entity capable of defending its interests. The members of the Presidency have a veto right whenever there is a violation of vital interests of the Entity from which they were elected. It cannot be maintained that only Serbs are able and willing to defend the interests of RS and only Croats and Bosniacs the interests of the Federation.

18. Furthermore, members of the three constituent peoples can be elected to the Presidency but they may be prevented from standing as candidates in the Entity in which they reside if they live as Serbs in the Federation or as Bosniacs or Croats in the RS. The Election Law (based on the corresponding provisions of the Constitution), however, clearly excludes Others, i.e. citizens of BiH who identify themselves as neither Bosniac nor Croat nor Serb, from the right to be elected to the Presidency. It may raise problems with respect to the equal right to vote and to stand for election under Article 25 of the ICCPR or with

equality under the law guaranteed to members of minorities under Article 4 of the Framework Convention to formally exclude members of minorities from a public office.

The House of Peoples

19. With respect to the House of Peoples of BiH, the constitutional provision to which Article 18.16 of the Election Law makes reference is worded as follows:

“Article IV

1. House of Peoples.

The House of Peoples shall comprise 15 Delegates, two-thirds from the Federation (including five Croats and five Bosniacs) and one-third from the Republika Srpska (five Serbs).

(a) The designated Croat and Bosniac Delegates from the Federation shall be selected, respectively, by the Croat and Bosniac Delegates to the House of Peoples of the Federation. Delegates from the Republika Srpska shall be selected by the National Assembly of the Republika Srpska.”

It seems *prima facie* that:

- Only citizens identified as belonging to one of the three constituent peoples can be elected to the House of Peoples;
- Serbs can only be elected to the House of Peoples from the Republika Srpska, Bosniacs and Croats only from the Federation of Bosnia and Herzegovina;
- Within the House of Peoples of the Federation, only the Bosniac and Croat delegates may take part in the election; other delegates are deprived from the right to vote in this respect.

These rules, which are provisions of the Constitution and not of the Election Law itself, raise particular problems with respect to the Federation. As regards the right to vote, this right applies also to indirect elections. In the Federation not all members of the Federation House of Peoples may vote but only the Croat and Bosniac members. There is therefore no equality between the parliamentarians. In the RS the situation is somewhat different since all members of the National Assembly may take part in the election although their choice is limited to Serb candidates. Although these rules reflect the same difficulties of mixing ethnic and territorial concepts as expressed in relation to the BiH Presidency, it is difficult to find a legal rationale for this different treatment of the same election in the two Entities, especially since this question is regulated by the Constitution of the State and not individually by the constitutions of the Entities.

20. With respect to the right to stand for election, as in the case of the BiH Presidency, first of all, persons not identifying themselves as Bosniac, Croat or Serb are completely excluded. But not only that. Entity and Ethnicity are linked and only Serbs from RS and Croats and Bosniacs from the Federation may be elected. No Serb from the Federation and no Croat or Bosniac from the RS may sit in the House of Peoples, which is a chamber with full legislative powers. A significant part of the population of BiH therefore does not seem to have a right to be elected to the House of Peoples.

21. The ethnic grouping of candidates for this House is coherent inasmuch as the specific characteristic of the House of Peoples is that delegates have a vital interest veto in case of the violation of the interests of their respective peoples. It is legitimate to assume that

parliamentarians from the respective peoples are the best judges on what their vital interest are. Nevertheless, granting precisely to those people who are already dominant such a veto and not to small groups requiring protection is a questionable practice. This issue was discussed with respect to the Entity constitutions by the Constitutional Court of BiH, in its Partial Decision III in Case 5/98 on the issue of the “constituent peoples” at §§ 115-116. In particular, such a practice may raise questions under international law, and specifically in the light of Article 5 of the International Convention on the Elimination of Racial Discrimination that are not saved by the exemption provisions of Article 1 para. 4 of the Convention.

Specificities of the situation in BiH

22. It is apparent from the above considerations that the electoral rules in the BiH Constitution for the Presidency and the House of Peoples, which are necessarily reflected in the provisions of the Electoral Law, appear *prima facie* to exclude citizens from the right to stand for election if they belong to an ethnic group which is in the minority where they live and would seem therefore to be incompatible with international standards. One might however still wonder whether under the specific, fairly exceptional, conditions of BiH such an apparent discrimination may be justified. The European Court of Human Rights in its decision *Mathieu-Mohin and Clerfayt v. Belgium* seemed willing to leave to States a particularly wide margin of appreciation in the sensitive area of election law. Equality of voting rights and non-discrimination are among the most important values of a constitutional system. However, illicit discrimination can only be assumed if there is no reasonable and objective justification for a difference in treatment.

23. In the present case, the distribution of posts in the State organs between the constituent peoples was a central element of the Dayton Agreement making peace in BiH possible. In such a context it is difficult to deny legitimacy to norms that may be problematic from the point of view of non-discrimination but necessary to achieve peace and stability and to avoid further loss of human lives. The inclusion of such rules in the text of the Constitution at the time therefore does not deserve criticism although they run counter to the general thrust of the Constitution aiming at preventing discrimination.

24. This justification has to be considered, however, in the light of developments in BiH since the entry into force of the Constitution. This opinion is drafted with a view to the accession of BiH to the Council of Europe and the country has therefore to be assessed according to the yardstick of common European standards. It has now enjoyed for several years an – albeit imperfect – peace. It is not up to the Venice Commission to give a political assessment of the situation. It nevertheless seems clear, on the one hand, that there has been an evolution in a positive sense, and on the other, that there remain circumstances requiring a political system that is not a simple reflection of majority rule but guarantees a distribution of power and positions among ethnic groups. It therefore remains legitimate to try to design electoral rules ensuring appropriate representation for various groups.

25. This can, however, be achieved without entering into conflict with international standards. It is not the system of consensual democracy as such which raises problems but the mixing of territorial and ethnic criteria and the apparent exclusion from certain political rights of those who appear particularly vulnerable. It seems possible to redesign the electoral

rules to make them compatible with international standards while maintaining the political balance in the country.

26. As regards the Presidency, a multi-ethnic composition can be ensured in a non-discriminatory way, for example by providing that not more than one member of the Presidency may belong to the same people and combining this with an electoral system ensuring representation of both Entities. The same applies to the House of Peoples where for example a maximum number of seats for members from one people could be fixed. Other solutions could also be envisaged. The legitimate aims of the rules can in any case be attained without entering into conflict with the equal right to vote and stand for election and the present rules of the Constitution and the Election Law cannot in the long term be justified as necessary under the specific conditions of BiH.

27. In the light of the above considerations it appears that it will be necessary to address the question of revising the relevant rules of the Election Law and the Constitution. It should nevertheless be emphasised that constitutional change in any democracy requires reflection and consultation, particularly when central power-sharing institutions are involved. The Commission cautions against undue haste in undertaking such revisions, which may in itself cause problems with regard to the respect of the principles of democracy and the rule of law. It notes that Article 25 ICCPR includes the right to periodic elections on an equal footing with the other electoral rights protected, and therefore finds that it would be advisable to continue to hold elections in line with the electoral timetable foreseen on the basis of the provisions currently in force, until such time as the relevant provisions of the Constitution have been amended and the Electoral Law amended accordingly to take account of the issues raised above.

Other remarks

28. Having regard to the specific purpose of this opinion, the Commission does not wish to enter into technical details of the Law. It would however like to draw attention to the composition of the election commissions and polling station committees. According to the Law (articles 2.5 and 2.14) their composition has to reflect the ethnic composition of the country or respective area. There is no provision requiring that its composition should ensure political pluralism and representation of the main political parties. The assumption seems to be that ethnicity determines political allegiance. With the increasing emergence of multiethnic parties this situation may change and the composition of election commissions and polling station committees may need to be re-examined.

29. The Law also contains complicated provisions as to the place where a person may vote. Displaced persons may vote either in their place of residence or in the place where they currently live (Article 18.8). The overall goal of the provision, to solve the property question, is defensible. However, under the current legal and technical circumstances, a certain number of issues raised by this rule need to be addressed. The provision is confusing due to its vague wording, although some guidance may be found in Article 18.9, which serves a similar purpose but for persons running in elections. Technically, implementation will be very difficult, as the voters' register and housing registers are not compatible: the voters' register is centralised, whereas the housing registers are decentralised to the municipal level and equal standards are not applied. Furthermore, due to the unwillingness of many municipalities to issue any eviction orders, there is a risk that the provision may be

politically misused, with the effect that people may be treated unequally and thereby discriminated against.

Conclusions

30. The Commission finds that for the most part, the Election Law provides an acceptable legal framework for the holding of democratic elections in BiH. However, some questions are raised by the constitutional and legislative provisions governing elections to the Presidency and House of Peoples of BiH. As a consequence, the Commission finds as follows:

- it is essential that the Entities proceed with the process of constitutional revision in order to implement fully the “constituent peoples” decision of the Constitutional Court of BiH as soon as possible, and in particular inasmuch as this is the precondition to revising the provisions governing elections to the Presidencies of the Entities which do not currently figure in the Election Law;
- the provisions of the Election Law governing elections to the Presidency and the House of Peoples of BiH raise questions as to their compatibility with international standards. Any deviations from the principle of the equal right to vote and stand for election are however due to explicit rules in the text of the Constitution. Curing such deviations would require amendments to the Constitution which will then have to be reflected in the electoral law. Nevertheless, such revisions could be carried out in a manner which would safeguard the position and equality of the constituent peoples by maintaining the multi-ethnic character of both institutions;
- the holding of elections that fall due under the normal electoral timetable should not be postponed pending the amendment of the Constitution and Election Law, but elections should be carried out on the basis of the provisions in force until such time as they have been amended;
- the implementation of Article 18.8 of the Election Law should be closely monitored to ensure that it is not applied in a discriminatory manner.

31. Finally, the Commission emphasises that its recommendations cannot be implemented overnight but in some cases may require serious institutional adjustments. These should be closely monitored by the Council of Europe both before Bosnia’s accession to the Council and after it, in the context of post-accession monitoring procedures. The Commission stands ready to assist the relevant bodies in this process.

