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Croácia

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Na Croácia, a abstenção registada nas eleições legislativas de 5 de julho³ de 2020 foi não só bastante superior à que se tinha verificado nas eleições de novembro de 2015, como ficou igualmente acima da que já se tinha registado em dezembro de 2011 (ver quadro). Estávamos em julho de 2020, cerca de três meses depois da Organização Mundial da Saúde (OMS) ter declarado a COVID-19 como uma pandemia, vivia-se uma época de grande incerteza em relação ao flagelo pandémico e eram escassas ou mesmo incipientes as medidas tomadas pelo governo croata em relação às pessoas infetadas e já confinadas⁴. Com efeito, e numa tentativa de evitar uma fraca participação eleitoral, o governo limitou-se a recomendar que os eleitores fizessem ou o teste covid no dia das eleições ou, em alternativa, que procedessem à medição da temperatura cor-

poral, tendo determinado que se o teste fosse positivo ou o índice de temperatura fosse superior aos valores normais, o eleitor estaria impedido de votar⁵. No entanto, apesar dessas medidas, entendeu na altura a Comissão Eleitoral Estatal que os eleitores que estivessem em isolamento poderiam votar mediante a recolha em casa do seu voto pelas autoridades competentes⁶, sendo apenas necessário que fosse feito um registo antecipado. Já quanto às demais medidas de combate à possível abstenção, pensamos que elas se revelaram inconsequentes. Na realidade, numa primeira fase, os eleitores que estivessem infetados com COVID-19 e que o detetassem após o dia 2 de julho de 2020 não conseguiam votar. Não o podiam sequer fazer através do voto em casa, pois isso exigia um registo prévio para o efeito. E na mesma situação se encontrava quem no dia da eleição tivesse a temperatura corporal alta. Também para estes eleitores não restava alternativa à abstenção.

Tal situação suscitou muita crítica de constitucionalistas que defenderam não haver base legal para uma restrição ao exercício do direito de voto, um direito fundamental plasmado no artigo 45º, da Constituição da República da Croácia⁷. Foi disso exemplo, a posição quer da professora Sanja Barić, bem como do professor Branko Smerdel (constitucionalistas croatas), que defenderam serem estas medidas claramente inconstitucionais, já que violadoras do princípio da proporcionalidade, e que, por isso, as eleições podiam estar feridas de irregularidade⁸. Porém, para a Comissão Eleitoral croata

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- 2 Finalista em Relações Internacionais, na Universidade Lusíada (Porto). Investigador colaborador do Centro de Estudos Jurídicos Económicos e Ambientais (CE-JEA), da Universidade Lusíada.
- 3 Devemos referir que as eleições foram antecipadas, por pressão política da União Democrática Croata (HDZ), por considerar que a antecipação poderia beneficiar quer dos poucos casos ainda registados de Covid, quer da eficácia inicial das medidas de prevenção anunciadas. Sobre esta questão é quanto a nós relevante o artigo que foi publicado na *Political Studies Review*: 2021, Vol. 19(2). Cf. *Political Studies Review*: 2021, Vol. 19(2), pp. 311–323. Apesar disso, não há quem deixasse de defender que a antecipação das eleições se deveu também muito a um aproveitamento político-eleitoral, ora veja-se “Voters in Croatia even went to the polls ahead of time, although critics argued that the government brought the date forward this early for political reasons”. Toby James and Erik Asplund «What happens after elections are postponed? Responses to postponing elections during COVID-19 vary by regime type». *International IDEA*. 2020. Disponível em <https://www.idea.int/news-media/news/what-happens-after-elections-are-postponed-responses-postponing-elections-during> (acesso em 18/3/2022).
- 4 No mesmo sentido vai a OECD quando num seu relatório refere que “Parliamentary elections were held in Croatia on 5 July. Voter turnout was significantly lower than in previous years, at 46.9%, the lowest since the first democratic elections in 1990, most probably due to fear of COVID-19 infection by voters”. In «Tackling Coronavirus (COVID-19)-Contributing to a global effort», Relatórios dos dias 4, 12 e 19 de agosto de 2020, disponíveis in <https://www.oecd.org/south-east-europe/COVID-19-Crisis-in-Croatia-archive.pdf> (acesso em 10/3/2022).

- 5 Veja-se a este respeito a divulgação feita sobre estas medidas, na comunicação social croata e, em particular, na “Total Croatia News”, disponível in <https://www.total-croatia-news.com/politics/44640-dip-says-epidemiological-measures-to-be-in-place-during-voting-on-july-5> (acesso a 10/3/2022).
- 6 A Comissão Eleitoral referiu que a inscrição para votar neste formato deveria ocorrer até ao dia 2 de julho, sendo que se procederia à recolha do boletim de voto, em casa dos eleitores. Sobre esta medida é quanto a nós relevante o trabalho de Marin Keršić, «Voting in Times of a Pandemic: The Case of Croatia: Constitutional Conflict between the Right to Vote and the Protection of Health», *VerfBlog*, 2020. Disponível in <https://verfassungsblog.de/voting-in-times-of-a-pandemic/> (acesso em 10/3/2022).
- 7 Article 45 - §1 All Croatian citizens who have reached the age of eighteen years (voters) shall be entitled to universal and equal suffrage in elections for the Croatian Parliament, the President of the Republic of Croatia and the European Parliament and in decision-making procedures by national referendum, in compliance with law. Constituição da República Croata disponível in <https://www.usud.hr/sites/default/files/dokumenti/The consolidated text of the Constitution of the Republic of Croatia as of 15 January 2014.pdf> (acesso em 17/3/2022).
- 8 Sobre as posições dos constitucionalistas Sanja Barić e Branko Smerdel, cf. «Constitutional experts Baric and Smerdel: SEC deprives infected people of their

a restrição era adequada e proporcional, limitando-se a aplicar e cumprir o que estava previsto no artigo 16º da lei fundamental⁹, que admitia poderem ser restritos direitos e liberdades fundamentais para proteção da saúde pública.

A questão não deixou de merecer a intervenção do Tribunal Constitucional que ao colocar-se do lado das posições críticas, determinou que devia ser dada oportunidade de voto às pessoas em isolamento. E, nesse sentido, estabeleceu a necessidade de serem encontradas soluções que garantissem o exercício do direito de voto e que não afetassem a saúde pública¹⁰. Essa seria, pois, a via para garantir a proporcionalidade da restrição¹¹.

Seria, assim, adotado um sistema em que o eleitor entregava o seu voto a uma pessoa da sua confiança (o *proxy*)¹² que se limitaria a entregá-lo aos elementos da Comissão Eleitoral que iam até à casa da pessoa infetada fazer essa recolha, sendo que os eleitores poderiam requerer o exercício do direito de voto através deste formato no próprio dia. Mas na prática, apesar da medida, a Comissão Eleitoral não conseguiu assegurar a todos os eleitores que requereram esta modalidade de voto, a entrega de boletins de voto. Foi uma situação que não deixou de ser salientada pelos observadores da OSCE, que no seu relatório afirmaram: “*Voters could request a mobile ballot until noon on election day, without a specific procedure or justification required, but also without a guarantee that it will be granted. Many, but*

not all requests could be served”¹³.

Poderemos concluir, que toda a querela em torno das eleições terá contribuído para um sentimento de alguma desconfiança em relação às medidas, desconfiança que por sua vez se traduziu em sentimento de insegurança do próprio eleitor. Se a isto acrescentarmos a falta de resposta da Comissão Eleitoral para satisfazer todos os pedidos feitos para que o direito de voto fosse exercido em casa, não podemos estranhar a abstenção registada. Abstenção, diga-se em abono da verdade, que só não foi superior quer pela firme posição do Tribunal Constitucional, quer pelo facto do número de infetados por COVID-19 ser à época ainda reduzido¹⁴.

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Tipo de eleição	Ano da eleição	Taxa de abstenção
Legislativas	2020	53.1%
	2016	47.4%
	2015	39.2%

Tabela 1: Comissão Eleitoral do Estado Croata¹⁵

right to vote». *Telegram*, 2020. Disponível in <https://www.telegram.hr/politika-kriminal/ustavni-strucnjaci-baric-i-smerdel-dip-je-oduzeo-pravo-glasa-zarazenima/> (acesso em 17/3/2022).

- 9 Article 16 - §1 Freedoms and rights may only be restricted by law in order to protect the freedoms and rights of others, the legal order, and public morals and health. §2 Any restriction of freedoms or rights shall be proportionate to the nature of the need for such restriction in each individual case. Quanto à posição da Comissão Eleitoral *vide* <https://www.hina.hr/vijest/10407932> (acesso em 17/3/2022).
- 10 O Tribunal Constitucional debruçou-se sobre isto no processo U-VII-2980/2020, ora veja-se in <https://sljeme.usud.hr/usud/prakswen.nsf/f0dluka.xsp?action=openDocument&documentId=54A9F7A62A4363AAC125859F00234EC8> (acesso em 18/3/2022).
- 11 A polémica não seria indiferente para a OSCE, que no seu relatório sobre as eleições croatas diria a este respeito: “*A controversy arose in connection with these instructions, suggesting that persons infected with COVID-19, and initially also persons with a fever or other characteristic symptoms, would not be permitted to vote, due to the health risks involved. This position was challenged by citizen election observers and academics as violating the universality of suffrage and led to the filing of a motion with the Constitutional Court by a candidate (see Complaints and Appeals section). The Court did not uphold the SEC’s position and obligated it to adjust the procedures in order to facilitate the exercise of the right to vote of persons diagnosed with COVID-19. The SEC altered its technical instructions promptly; however, this happened only two days before elections. The instructions were, thus, amended twice after having been issued at the beginning of the election week*”. Cf. Organization for Security and Co-operation in Europe (OSCE), «Republic of Croatia Parliamentary Elections (5 July 2020) ODIHR Election Assessment Mission Final Report», Warsaw, 2020. p.7, §3. Disponível in https://www.osce.org/files/f/documents/b/4/465120_0.pdf (acesso em 18/3/2022).
- 12 *Vide* «DIP: People Infected with COVID-19 Allowed to Vote by Proxy». *Total Croatia News*, 2020. Disponível in <https://www.total-croatia-news.com/politics/44756-dip-people-infected-with-covid-19-allowed-to-vote-by-proxy> (acesso em 17/3/2022). Também sobre isto se pronunciou Marin Keršić, ao sublinhar que “*The voting of the persons infected with COVID-19 was carried out by a proxy – the person of trust: after a call from the COVID-19 positive person, the election committee would come in front of the home of the infected person, and the trusted person filled out the ballot and handed it to the election committee in an envelope*». Keršić, *op. cit.*

13 OSCE, *op. cit.*, p.17, §5.

14 Ao dia 6 de julho de 2020 foram registadas 96 novas infeções, mas ao dia 22 de julho de 2020 registavam-se 179 novas infeções e no final do mês de agosto já se registavam 668 novas infeções e esta tendência ascendente só teve paragem a meados de setembro. Dados de acordo com a *Reuters*, «Croatia COVID-19 Tracker», Disponível in <https://graphics.reuters.com/world-coronavirus-tracker-and-maps/countries-and-territories/croatia/> (acesso em 7/3/2022).

15 Disponível in <https://www.izbori.hr/site/UserDocsImages/1575>.

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In Croatia, the abstention registered in the legislative election at July, 5th of 2020³ was not much higher than it had been in the November 2015 elections, as it was also higher than it had been in December 2011 (see table).

We were on July 2020, nearly three months after the declaration of the Covid-19 as a pandemic by the World Health Organization (WHO), in a time of great uncertainty there was great uncertainty about the pandemic and little or no action was taken by the Croatian government in relation to infected people already confined⁴. Consequently, as an attempt to avoid a poor electoral participation, the government simply recommended that voters take either the covid test on election day or, alternatively, to measure body temperature, and determined that if the test was positive or the temperature level was above normal values, the voter would be un-

able to vote⁵.

However, beside these measures, the National Electoral Commission had considered that voters who were isolated could vote by having their vote collected at home by the competent authorities⁶. To do this, it was only necessary to register in advance. As for the other measures to combat possible abstention, we think they proved to be ineffective.

Actually, in an initial stage, voters who were infected with COVID-19 and detected it after July 2, 2020 would not be able to vote. They couldn't even do this by voting at home, as this required prior registration to do so. And in the same situation were those who had a very high temperature on election day. For these voters there was also no alternative but to abstain.

This situation has created a massive criticism from constitutional experts who claimed no legal basis for a restriction on the exercise of the right to vote as a fundamental right preserved in Article 45 of the Constitution of the Republic of Croatia⁷. This was exemplified by the position of Croatian constitutionalist Professor Sanja Barić and Professor Branko Smerdel, who argued that these measures were clearly unconstitutional as they were in violation of the principle of proportionality, and therefore the elections could be illegal⁸.

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3 It should be noted that the elections were brought forward, under political pressure from the Croatian Democratic Union (HDZ), as it felt that bringing them forward would benefit both the few still registered cases of Covid and the initial effectiveness of the announced prevention measures. On this issue we find relevant the article that was published in *Political Studies Review*: 2021, Vol. 19(2). Cf. *Political Studies Review*: 2021, Vol. 19(2), pp. 311–323. Nevertheless, there are those who would argue that the anticipation of the elections was also due to political-electoral exploitation. Voters in Croatia even went to the polls ahead of time, although critics argued that the government brought the date forward this early for political reasons". Toby James and Erik Asplund «What happens after elections are postponed? Responses to postponing elections during COVID-19 vary by regime type». *International IDEA*. 2020. Available in <https://www.idea.int/news-media/news/what-happens-after-elections-are-postponed-responses-postponing-elections-during> (accessed at 18/3/2022).

4 The OECD goes in the same direction when it states in a report that "Parliamentary elections were held in Croatia on 5 July. Voter turnout was significantly lower than in previous years, at 46.9%, the lowest since the first democratic elections in 1990, most probably due to fear of COVID-19 infection by voters". In «Tackling Coronavirus (COVID-19)-Contributing to a global effort», Reports from August 4th, 12th and 19th of 2020, available in <https://www.oecd.org/south-east-europe/COVID-19-Crisis-in-Croatia-archive.pdf> (accessed at 10/3/2022).

5 In this regard, see the coverage of these measures in the Croatian media and, in particular, in "Total Croatia News", available in <https://www.total-croatia-news.com/politics/44640-dip-says-epidemiological-measures-to-be-in-place-during-voting-on-july-5> (accessed at 10/3/2022).

6 The Electoral Commission stated that registration to vote in this format should occur until July 2, and that the ballot paper would be collected at the homes of the voters. Regarding this measure, we believe that the work of Marin Keršić, «Voting in Times of a Pandemic: The Case of Croatia: Constitutional Conflict between the Right to Vote and the Protection of Health», *VerfBlog*, 2020. Available in <https://verfassungsblog.de/voting-in-times-of-a-pandemic/> (accessed at 10/3/2022).

7 Article 45 - §1 All Croatian citizens who have reached the age of eighteen years (voters) shall be entitled to universal and equal suffrage in elections for the Croatian Parliament, the President of the Republic of Croatia and the European Parliament and in decision-making procedures by national referendum, in compliance with law. Constitution of the Republic of Croatia available in [https://www.usud.hr/sites/default/files/dokumenti/The consolidated text of the Constitution of the Republic of Croatia as of 15 January 2014.pdf](https://www.usud.hr/sites/default/files/dokumenti/The%20consolidated%20text%20of%20the%20Constitution%20of%20the%20Republic%20of%20Croatia%20as%20of%2015%20January%202014.pdf) (accessed at 17/3/2022).

8 Regarding the positions of the constitutional scholars Sanja Barić and Branko Smerdel, cf. «Constitutional experts Barić and Smerdel: SEC deprives infected people of their right to vote», *Telegram*, 2020. Available in <https://www.telegram.hr/politika-kriminal/ustavni-strucnjaci-baric-i-smerdel-dip-je-oduzeo-pravo-glas-a-zarazenima/> (accessed at 17/3/2022).

Although, for the Croatian Electoral Commission, the restriction was appropriate and proportional, merely applying and complying with the provisions of Article 16 of the Basic Law⁹, which admitted that fundamental rights and freedoms could be restricted for the protection of public health.

Nevertheless, the issue did not avoid the intervention of the Constitutional Court, that by taking the side of the critical positions, he ruled that isolated people had to be allowed to vote, so it has been established the need to find a solution that would guarantee the exercise of the right to vote and would not impact public health¹⁰. This would be, therefore, the way to guarantee the proportionality of the restriction¹¹.

A system would thereby be adopted in which the voter gives his vote to a person he trusts (*the proxy*)¹² who would simply hand it to the Electoral Commission members, who would then go to the home of the infected person to collect it, while voters could request their right to vote through this format on the same day.

However, in practice, despite the measure, the Electoral Commission was unable to ensure that all voters who requested this form of voting would receive their voting papers. This situation was highlighted by the OSCE observers, who stated in their report: “*Voters could request a mobile ballot until noon on election day, without a specific procedure or justification required, but also without a guarantee that it will be granted. Many, but not all requests could be served*”¹³.

We can conclude that the whole dispute over the elections has con-

tributed to a feeling of some distrust in relation to the measures, a feeling of distrust that, in turn, translated into a feeling of insecurity among the voters themselves. If to this we add the lack of response from the Electoral Commission in satisfying all requests made to exercise the right of voting at home, we cannot be surprised by the abstention registered. Which was not higher due to the firm position of the Constitutional Court, and to the fact that the number of people infected with COVID-19 was, at the time, small¹⁴.

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Type of Election	Election Year	Abstention Tax
Legislatives	2020	53.1%
	2016	47.4%
	2015	39.2%

Table 1: Croatia Electoral Commission¹⁵

9 Article 16 - §1 Freedoms and rights may only be restricted by law in order to protect the freedoms and rights of others, the legal order, and public morals and health. §2 Any restriction of freedoms or rights shall be proportionate to the nature of the need for such restriction in each individual case. Regarding the position of the Electoral Commission *vide* <https://www.hina.hr/vijest/10407932> (accessed at 17/3/2022).

10 The Constitutional Court has addressed this in case U-VII-2980/2020, see below in *in* <https://sljeme.usud.hr/usud/prakswen.nsf/FOdluka.xsp?action=openDocument&documentId=54A9F7A62A4363AAC125859F00234EC8> (accessed at 18/3/2022).

11 The controversy would not be indifferent to the OSCE, which in its report on the Croatian elections would say so: “*A controversy arose in connection with these instructions, suggesting that persons infected with COVID-19, and initially also persons with a fever or other characteristic symptoms, would not be permitted to vote, due to the health risks involved. This position was challenged by citizen election observers and academics as violating the universality of suffrage and led to the filing of a motion with the Constitutional Court by a candidate (see Complaints and Appeals section). The Court did not uphold the SEC’s position and obligated it to adjust the procedures in order to facilitate the exercise of the right to vote of persons diagnosed with COVID-19. The SEC altered its technical instructions promptly; however, this happened only two days before elections. The instructions were, thus, amended twice after having been issued at the beginning of the election week*”. Cf. Organization for Security and Co-operation in Europe (OSCE), «Republic of Croatia Parliamentary Elections (5 July 2020) ODIHR Election Assessment Mission Final Report», Warsaw, 2020. p.7, §3. Available in https://www.osce.org/files/f/documents/b/4/465120_0.pdf (accessed at 18/3/2022).

12 *Vide* «DIP: People Infected with COVID-19 Allowed to Vote by Proxy». *Total Croatia News*, 2020. Available in <https://www.total-croatia-news.com/politics/44756-dip-people-infected-with-covid-19-allowed-to-vote-by-proxy> (accessed at 17/3/2022). Regarding this subject Marin Keršić, also commented by underlining that “*The voting of the persons infected with COVID-19 was carried out by a proxy – the person of trust: after a call from the COVID-19 positive person, the election committee would come in front of the home of the infected person, and the trusted person filled out the ballot and handed it to the election committee in an envelope*». Keršić, *op. cit.*.

13 OSCE, *op. cit.*, p.17, §5.

14 On July 6th, 2020 there were 96 new infections, but on July 22nd, 2020 there would be 179 new infections and by the end of August there would have been 668 new infections, and this trend only stopped in mid-September. Available *Disponível in* <https://graphics.reuters.com/world-coronavirus-tracker-and-maps/countries-and-territories/croatia/> (accessed at 7/3/2022).

15 Available in <https://www.izbori.hr/site/UserDocs/Images/1575>.