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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

ON THE LAWS ON PARLIAMENTARY, PRESIDENTIAL AND LOCAL ELECTIONS IN THE REPUBLIC OF SERBIA

by

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I. Introduction

1. The following comments are submitted to the Secretariat of the Venice Commission in response to a request (within the framework of the Joint Programme with the European Commission "Democracy through Free and Fair Elections") for providing an opinion, jointly with the OSCE/ODIHR, on the current electoral legislation of the Republic of Serbia. The comments concern a draft report on the subject prepared by the OSCE/ODHIR as of 3 June 2005, on the basis of comments by Mr. Jessie Pilgrim, entitled "Assessment of the Laws on Parliamentary, Presidential and Local Elections in the Republic of Serbia"[1] (hereinafter referred to as the "Report") and are structured accordingly.

2. The Serbian legislation considered comprises the following laws, here reviewed in English translation:

(a) Law on the Election of Representatives of the Republic of Serbia (VC document CDL-EL(2005)26). As I understand, this Law consisting of Articles 1-117 was basically adopted in the year 2000, replacing the earlier legislation frequently amended during the preceding decade, and is here considered in a consolidated version incorporating amendments made up to May 2004. Several of these are by means of Articles also identified by letter, so that the Law now has 127 Articles in all (of which one has been partially annulled by Constitutional Court decision).

(b) Law on Electing the President of the Republic of Serbia (document CDL-EL(2005)25). This Law now consisting of 23 Articles (i.e. Articles numbered 1-15, with four of those deleted and Articles also identified by letter added) was basically adopted in 1990 and is here considered in a consolidated version including amendments made in 1992, 2002, 2003 and February 2004.

(c) Law on Local Elections of the Republic of Serbia (document CDL-EL(2005)27). As I understand, this Law consisting of 67 Articles was basically adopted in 2002, replacing the earlier legislation.

The first-named Law on the election of representatives to the Parliament (National Assembly) of Serbia has a broader base than the other two, in that many of its provisions are incorporated by reference in the Law on presidential elections and the Law on local elections.

II. General Remarks

3. The above electoral laws of Serbia are basically well structured and their provisions are generally clear and to the point for the most part. The electoral system provided for is generally suited to ensure democratic and free and fair elections. As discussed in the Report, the legislation contains a number of important safeguards and principles for the promotion of democratic election practices, including measures designed to enhance transparency in the organisation and conduct of the election process and to protect the security of the ballot. Although the present comments relate more to the laws as such than their implementation in practice, it is proper to note also that European observers of recent elections have reported being

[1] See the following appendix.

impressed by the degree of professionalism and competence and the sense of responsibility generally shown by those in charge of the conduct of the elections.

4. In some areas, however, it appears that the legislation fails to comply fully with European standards for free and fair elections. The main problem issues to be seen with the three laws are listed in the Report within chapter II, *Executive Summary*, the contents of which are appended in general terms, except as otherwise specifically noted below.

III. The Law on Parliamentary Elections

A. Election Administration

5. The Parliament of Serbia is a unicameral body of 250 members directly elected by the people for a term of four years (Art. 3). The members are elected in a single national constituency, from among candidate lists presented by political parties, coalitions of parties, other political organisations and/or groups of citizens (Art. 4).

6. Influenced by the fact that the country is a single constituency, the law provides for the conduct of parliamentary elections by administration bodies operating at only two levels, i.e. the Republican Electoral Commission (REC) having national jurisdiction and polling boards (PBs) charged with the conduct of elections at single polling stations (Art. 6). The REC is a standing body whose permanent members are appointed by each new parliament for a term of four years (Arts. 30 and 33), while the members of the PBs have permanent status (i.e. a chairman and not less than two others) and are nominated by the REC shortly in advance of each election (Arts. 30, 34(8) and 36). Both the REC and the PBs operate with an expanded make-up of additional members determined in advance of each election through nominations by representatives of the candidate lists competing in the elections (Arts. 29, 33 and 36).

7. This two-tiered administration structure clearly appears to constitute a weakness in the electoral system, and experience from past elections in Serbia has shown that there is a need for an intermediary level of commissions with territorial jurisdiction in order to enhance co-ordination and alleviate logistical and organisational problems. In recent years, as I understand, the REC has sought to meet this need by setting up a number of *ad hoc* working groups for co-ordination purposes. As noted in the Report, however, it must be considered of high importance to address this issue in the law itself by providing for the establishment of territorial commissions capable of acting as intermediaries between the REC and the PBs, with a formal determination of their appointment, functions and responsibilities and the inclusion of appropriate transparency safeguards.

8. In this connection, as also related in the Report, it is to be noted that the Law on presidential elections provides for an intermediary level of election administration (Art. 5). However, its text seems to indicate that the bodies there designated for operating at this level (and whose defined functions include the appointment of PBs) are the election commissions of local government units, as established by the pertinent community assembly under the Law on local elections (Art. 14). If so, this feature of the Law on presidential elections will not be directly transferable to the system for the conduct of elections for the national parliament.

9. In connection with election administration, the Report emphasises the significance of having the Law include express guarantees of the rights of every member of an electoral commission to have the opportunity to participate fully in the administration of the elections. The comments to this effect are to be appended.

10. Further, in relation to the functions of polling boards, the Report refers to Articles 55 and 69 of the Law, which lay down certain basic principles for the conduct of voting at polling stations and provide that in the event of an infringement of these principles, the PB in question shall be dissolved and the voting at the polling station repeated. The comments on these provisions appear to be overly critical, since all the principles expressed have an important bearing on the integrity of the vote at the specific polling place. Accordingly, the need to qualify the provision for a disbanding of the PB (which presumably will not necessarily occur on the polling day itself) and a repetition of the voting is not quite so strong as the text of the Report seems to indicate. However, the resulting recommendation is to be appended to the extent that it would be reasonable to have a provision in the Law (in the above Articles or elsewhere) stating that a repetition of voting with a new PB need not be resorted to if the irregularity in question is not serious or significant enough to have an impact on the overall integrity of the elections or the determination of the overall allocation of mandates.

B. Transparency

11. The comments in the Report on this subject involve considerations of high importance and are to be appended.

C. Suffrage

12. As noted in the Report, the Constitution of Serbia (Art. 42) simply states that every citizen who has reached the age of 18 shall have the right to vote and to be elected to the National Assembly and other agencies and bodies, while Article 10 of the Law on parliamentary elections adds three further conditions, namely that the person must (i) be a Yugoslav citizen, (ii) have business capacity (i.e. general legal capacity) and (iii) have a permanent residence (domicile) within Serbia. Leaving aside the issue of Yugoslav citizenship, the comments applicable to the other conditions mainly are that both of them would appear to be consistent with democratic standards and the underlying principle of the Constitution, and thus do not call for critical comment.

13. However, with respect to the requirement for permanent or habitual residence (the determination of which presumably depends on other legislation of Serbia), the question perhaps may be raised as to whether it involves an unreasonable or unnecessarily strict condition in the case of national elections. On the other hand, the condition has the positive aspect that it does not seem to require a returning citizen to establish a domestic residence over a minimum period in advance of the elections or the announcement of his candidacy. It may also be noted that this part of the Law has been expanded on a positive manner by a recent Article 13a containing explicit provisions on the registration of voters with temporary residence abroad (on a special voter list), however these do not appear to alter the basic residence requirement.

D. Voter Lists

14. The comments of the Report on this important subject are to be appended, although it is also to be noted that the voter list provisions of the Law appear to have been strengthened positively by its recent amendments. The Law states quite clearly that the electoral list should constitute a single and permanent document which is obliged to be brought up to date every year (Art. 12, para. 4), but the allocation of responsibility for its keeping does not seem similarly clear.

E. Candidacy

15. The comments of the Report on this subject are to be appended, but with certain reservations. Thus while it is desirable to have a clear view of the conditions required for a group to count as an "other political organisation" able to present parliamentary candidates (Art. 4), the eventual consequences of not so doing may not be very serious, as "groups of citizens" are entitled to present candidates in any event. The principles of freedom of association are also to be taken into account here.

16. Further, there seems no cogent reason to construe the description "groups of citizens" in a strict rather than a liberal sense, given the basic weight of the principle of universal suffrage. In fact it does not appear unreasonable or contrary to the spirit of the Law to give the description so liberal a meaning as to include also a single individual, as the major general limitation on the feasibility of attempting candidacy presumably lies in the requirement for a sufficient number of supporter signatures (and it also would seem possible to look upon the signing supporters as the "group" in the case of a single person's independent candidacy, and/or possible for them to adjust to the term of "group" by various means). Viewed in this light, the issue of amending the Law so as to specify the possibility of an individual's self-nomination for candidacy does not seem highly significant except for purposes of the clearer encouragement of single candidates, and unless the change is coupled with a further amendment enabling an individual to proceed with fewer signing supporters than a formal group or political party.

17. In any case, the key question concerning the possibility of independent individual candidacies for the Serbian National Assembly would seem to be whether the general threshold for winning a mandate can be lowered in favour of independent candidates (as distinguished from parties or organised groups) to a degree sufficient to avoid a major watering-down of the voting power of his or her supporters. A 5% general threshold would seem to call for quite a substantial reduction, which then might raise issues of discrimination.

18. Finally, as noted in the Report, the Law approaches the matter of checking the validity of supporter signatures by requiring every signature to be authenticated by a court, for which a fee will be charged (by an amount regulated by the Ministry of Justice). The signatures are to be applied to or set out in a form determined and/or issued by the REC only shortly before the elections are due to be called (Art. 43). These provisions seem somewhat on the restrictive side due to the effort apparently involved, but conducive to the authenticity of the support. The court rules on verification are not described in the Law, but are likely to require the appearance of the signatory in the court office. This being a most thorough form of authentication, the result would seem to be that the election commissions generally need not check the signatures as such, but solely whether the signatory has the necessary voter status. The procedure or exhaustiveness of such latter checking is not expressly dealt with in the law.

F. Allocation of Mandates

19. In the Report, it is noted that the vote quantum reference for the 5% mandate allocation threshold set by the Law (Art. 81) is perhaps not quite clear (i.e. according to *CDL-EL(2005)26*, not less than 5% of the "votes of voters who have voted in the electoral district" or in *Legislationline.ORG*, the "total number of electors having voted in the constituency"). On the wording, the preferable interpretation seems to be that the reference is to the number of votes actually cast and counted out of the ballot boxes, whether valid or invalid (in that the reference is both to votes and voters, and also that the votes in the boxes normally are the most tangible count object after the polling).

20. The Report suggests that the most desirable threshold reference is the number of valid votes cast, as the election results otherwise may be influenced by citizens not having expressed a clear political preference. The recommendation for amending the Law to this effect is to be appended, even though there also are reasonable arguments for the above solution, namely that the invalidity of ballots is often due to a mere mistake by the voter and that a blank ballot is not necessarily to be regarded as a silent vote.

21. The proposal for clarifying the concept of "political parties of ethnic minorities" in relation to the 5% threshold (Art. 81) is to be appended.

22. Article 40a of the Law addresses the question of gender participation in elections in a positive manner and sets forth the principle that for every four candidates on an electoral list (in order from top to bottom), there shall be one candidate of the gender less represented on the list, and that the number of candidates of that gender shall not be less than 30%. The Report suggests that this may involve an inconsistency and perhaps an error in translation. This suggestion is not necessarily valid, as there is no clear conflict between 25% as a pro-rated minimum out of each four and 30% as a rounded overall minimum for the list. Accordingly, the suggestion might perhaps be reconsidered.

23. The recommendation that the Law should make it obligatory to have the order of persons on candidate lists determined in advance is to be appended. The scope of choosing persons for the allocated mandates apparently given to parties and other submitters of electoral lists (Art. 84) is not acceptable, at least in such an unlimited degree as the text seems to indicate (the only express limitation in the Law seems to be the above gender provision in Art. 40a). In this connection, it may be proper to add that an amendment of the Law to the recommended effect could be coupled with provisions permitting voters to alter the order on the list being voted for by means of renumbering and deletions, which is positive from the democratic viewpoint even though it may delay the final counting of the votes to some extent and also increase somewhat the risk of ballots becoming invalid by voter miswriting.

24. The recommendation concerning Article 88 of the Law as in force after partial annulment by reason of a Constitutional Court judgment is to be appended.

G. Campaign Finance

25. The comments of the Report on this subject matter, which is currently regulated by a recently adopted Law on the Financing of Political Parties, are to be appended.

H. Candidacy

26. The matter of media access of election contestants and other electoral matters on which mass media influence may have a bearing are now partially regulated by a Broadcasting Law of 2002, in addition to such regulation as provided in Articles 5 and 99-100 of the Law. The comments of the Report (including recommendations for clarification of responsibilities and co-ordination between the two laws) are to be appended. However, the legislative amendments to be considered hardly need to involve any change in the existing Article 5, which sets forth basic and straightforward principles.

I. Voting and Counting

27. The provisions of the Law on these subject matters are in the main quite satisfying and have been strengthened by recent amendments involving the insertion of Articles 72a-72d and 73a-73d. In the Report, it is suggested that the related Article 23(3) concerning the issue of "certificates of suffrage" by the agency (or agencies) responsible for maintaining the voter list does require clarification. The resulting recommendation for an amendment in the Law is to be appended, while at the same time, it may be said that the amendment actually needed may not be very extensive. The position under the Law seems to be that these certifications may be needed by candidates (Art. 44) and by voters who are voting other than at the polling station in which they are registered. In the case of mobile voting (Art. 72a), the PB at that station appears to be empowered to issue the certificate needed (presumably consistently with Art. 23), which is then signed by the respective voter for his part to enhance transparency of authentication.

28. The recommendation of the Report concerning Articles 59, 69 and 74, suggesting a qualification of the need for repeated voting in the event of irregularity in procedures, are also to be appended, but the reasons given for the recommendation should perhaps be modified as similarly mentioned in para. 10 above in relation to the said Articles. In any case, the comments to be made need to take account of the fact that national elections in Serbia are likely to be a contest between lists rather than individual candidates.

29. The recommendation for clarification of the rules for proof of voter identity (Art. 68) are to be appended.

30. As regards the comments on mobile voting procedures, however, a reservation seems to be in place. The new Article 72a on this subject seems to have been carefully drafted and *inter alia* takes account of pertinent recommendations in the Code of Good Practice in Electoral Matters (Section 3.2(vi) and para. 40 of the Explanatory Report). Accordingly, some of the restrictions suggested in the Report appear to be on the strong side and leaning unnecessarily far towards transparency and observability at the cost of desiderata concerning the ability of voters to exercise their rights and the national democratic interest for a high rather than low turnout in the elections. Thus it is to be doubted at least whether the reasons against having a deadline until 11 a.m. on election day for a mobile voting request are cogent enough to recommend a change in the Law.

31. The recommendation concerning Article 85 is to be appended, especially concerning the categorisation of ballots to include the number of ballots cast in mobile voting (this category perhaps is not already listed due to the recent introduction of the procedure). It may perhaps be added that in the category of null and void ballots, a distinction could be made between blank ballots and ballots invalid due to irregular marking. The recommendation for publicising the detailed results for each polling station is also to be appended on the grounds of transparency (although in some countries, this method is seen as involving a certain risk of impacting the secrecy of the voting and enhancing the potential for pressure on voters by well-established political parties).

J. Protection of Suffrage Rights

32. The recommendations of the Report on this subject are to be appended. As regards in particular the issue of ensuring a fair and impartial hearing of complaints or disputes arising from the election process, the lack of reference thereto in the Law itself may partly be due to a necessary measure of safeguards being provided in the general laws on judicial procedure and administrative proceedings, but the need to address it specifically within the Law itself nevertheless seems to be at hand.

K. Other

33. As a general remark in addition to the overall comments in the Report, it may be mentioned that the Law makes no provision for absentee voting except by detained persons (Art. 72b), persons in military and similar service (Art. 73) and persons able to obtain registration on the Special Records for Voters Residing Abroad. It is not quite clear how extensively this last-mentioned feature can be applied, especially whether it can be used by voters who happen to be travelling abroad on election day on short term trips or visits. Owing to the high mobility of people under modern-day conditions, the question may perhaps be raised also whether there is a need and appropriateness for extended procedures for voting by persons away from home at election time, whether inside or outside the country, should be tabled in Serbia as a matter for future consideration.

IV. Law on Presidential Elections

34. The President of the Republic of Serbia is directly elected by the people for a term of five years, with a second round of voting being held if none of the candidates receive a majority of the votes cast on election day. As noted above, the law on the presidential elections relies on the law on parliamentary elections for matters not specifically dealt with in the former, so that most of the comments in III. above also apply here. The comments and recommendations of the Report specifically concerning presidential elections are to be appended.

V. Law on Local Elections

35. This Law deals with the elections of councillors and presidents of municipal assemblies. These are elected by the people in the territory for a term of four years. As in national elections, councillors are elected from lists submitted by political parties, co-alitions, other political organisations and/or groups of citizens. As with the President of the Republic, assembly

presidents are elected in two rounds of voting if no candidate obtains a clear majority on election day. As noted above, the Law relies on the Law on parliamentary elections for matters not expressly dealt with in its text, so that many of the comments in III. above equally apply here.

A. Election administration

36. The administration of local elections has a two-tiered structure, consisting of Municipal Election Commissions (MECs) appointed by the respective municipal assembly and polling boards (PBs) appointed by the respective MEC. Both MECs and PBs operate with a permanent and expanded membership. In the Report, it is recommended for consideration that the national REC be also provided with a formal role in municipal elections, i.e. in order to ensure the consistency of election standards and thus for acting in a supervisory, advisory and coordinative role. Given the circumscription of such a role (which presumably would be played mainly by permanent membership of the REC), the recommendation is to be appended.

37. According to Article 14 of the Law, the permanent membership of an MEC shall comprise a president and at least four members (as well as deputies for each). The Law does not state whether they are to be elected by proportionate vote in the assembly or otherwise so as to ensure adequate plurality of membership. In the absence of such provision, it appears to be correctly noted in the Report that the Law fails to guarantee sufficient plurality. The same goes for balancing ethnic representation (which is not mentioned in the Article) where this may be in issue.

38. As to the expanded membership, the Law provides (in Art. 13(3) and 14(1)) that this should be constituted by nominees of the submitters of lists which are long enough to number at least ⅔ of the total number of candidates to be elected. In Art. 13(4), it is further provided that the submitters of two or more electoral lists may join in the nomination of an MEC member. In the Report, it is suggested that the ⅔ threshold is too high. On balance, despite this latter proviso, the resulting recommendation is to be appended.

39. The report further suggests that the Law (Art. 12) be amended by including a list of categories of persons who should not serve on a MEC (or PB) due to his or her holding a particular office or position. The suggestion is to be appended (with a reservation as regards court judges, cf. below).

B. Allocation of Mandates

40. The comments and recommendations of the Report on this subject are to be generally appended. It is only necessary to note that the gender requirements of candidate lists are not only contained in Article 42, but also in Article 20, which clearly states that a list as initially presented must have one out of every four candidates from the sex less represented on the list, and an overall minimum number of not less than 30% from that sex, otherwise it will be rejected. Accordingly, the gender provisions of the Law are quite similar to those of the Law on parliamentary elections (discussed in para. 22 above). Accordingly, the need for harmonisation between the two Laws is not as strong as perhaps indicated in the Report, and the requirements of the former do not seem less stringent than in the latter.

C. Election and Recall of the President of a Municipal Assembly

41. The comments of the Report are generally to be appended.

D. Protection of Suffrage Rights

42. The comments and recommendations of the Report on this subject are to be appended, except that a reservation may be made as regards the possibility of having members of the judiciary also sit as members on election commissions. As to this issue, it is to be noted that the Serbian electoral laws express a policy to the effect that the permanent membership of election commissions should include persons who hold an academic law degree (cf. Art. 14(4) of the Law on Local Elections and Art. 33(5) of the Law on Parliamentary Elections). It is also to be noted that in several countries, it is considered desirable to include judges as members on election commissions, and the same is reflected in the Code of Good Practice as far as national commissions are concerned (Section 3.1.d(i) and para. 75 of the Report). Clearly, the advantages to be gained by including judges must be weighed against the overriding principles of judicial independence and impartiality, but the weight of the latter is not necessarily sufficient to dictate an exclusion of judges. Accordingly, the recommendation, here to be given preferably should mainly emphasise the need to have electoral laws which include a clear expression of the tenet that a judge holding a seat on an election commission is wholly excluded from participating in any review of matters concerning the elections in question. A provision to this effect would be desirable from the point of view of precision and policy, even though it may normally be assumed that the pertinent safeguards are also contained within the laws on judicial procedure and in the national Constitution.

APPENDIX

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COMMENTS

ON THE DRAFT ASSESSMENT OF THE LAWS ON PARLIAMENTARY, PRESIDENTIAL AND LOCAL ELECTIONS IN THE REPUBLIC OF SERBIA

By

Mr Jessie PILGRIM (OSCE/ODIHR, election expert)

(3 June 2005)

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I. INTRODUCTION

This assessment comments on the following laws of the Republic of Serbia: Law on Elections of Representatives[2], Law on Electing the President of the Republic[3], and Law on Local Elections[4]. The texts relied on are unofficial English translations. This assessment does not warrant the accuracy of the translations reviewed, including the numbering of articles, paragraphs, and sub-paragraphs. Any legal review based on translated laws may be affected by issues of interpretation resulting from translation. A law can be assessed only on the literal translated text that is provided for review.

The Parliament (National Assembly) of Serbia is a unicameral body and consists of 250 members directly elected by secret ballot for a term of four years. Members are elected in a single national constituency on the basis of lists of political parties, coalitions of political parties, other political organizations, and groups of citizens.

The President is directly elected by secret ballot for a term of five years. A second round of voting is held if none of the candidates received a majority of the votes on election day. The second round of voting is held for the two candidates who received the largest number of votes in the first round. In the second round of voting, the winner is the candidate who receives the largest number of votes, regardless of the number of voters who voted.

In local government elections, voters elect councilors and presidents of municipal assemblies. These elections are direct elections on the basis of a secret ballot. The term of office for elected candidates is four years. Councilors are elected on the basis of lists of political parties, coalitions, other political organizations, and groups of citizens. An assembly president is elected in two rounds of voting should no candidate receive a majority in the first round of voting.

Both the Law on Presidential Elections and Law on Local Elections incorporate many provisions of the Law on Parliamentary Elections. Thus, the Law on Parliamentary Elections is discussed first.

II. EXECUTIVE SUMMARY

The Law on Parliamentary Elections includes a number of important safeguards to promote democratic election practices. In particular, there are numerous measures designed to enhance transparency in the organisation and conduct of the election and to protect the security of the ballot. However, in some areas, the law fails to fully comply with OSCE commitments and international standards.

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2 Consolidated version of the law dated 05.04, consisting of 117 articles (herein "Law on Parliamentary Elections").

3 Consolidated version of the law dated February 2004, consisting of 15 articles (herein "Law on Presidential Elections").

4 Consolidated version of the law dated 13 June 2002, consisting of 67 articles.

Problems with the law include:

- An election administration structure that does not provide an interim level of electoral commissions between the Republic level (Republic Electoral Commission – REC) and precinct level (polling boards – PBs).

- Provisions regulating dissolution of polling boards on election day.

- Failure to provide for participation in the electoral process of both international and non-partisan domestic observers.

- Provisions for establishment and maintenance of voter lists that require improvement.

- Provisions for authenticating signature lists in support of a candidate list that require clarification.

- Provisions for campaign finance that require clarification.

- Provisions for equal access to the media that require clarification.

- Provisions for mobile voting that should be improved.

- Failure to require the REC to publish detailed election results that categorize all types of ballots, including ballots cast by mobile ballot boxes.

- Inadequate provisions for the adjudication of election disputes and protection of suffrage rights.

The Law on Presidential Elections incorporates many of the provisions of the Law on Parliamentary Elections. Many of the shortcomings of the Law on Parliamentary Elections are applicable to the Law on Presidential Elections. However, the Law on Presidential Elections does provide for an interim level of election administration between the REC and PBs. This is a positive aspect of the Law on Presidential Elections. Issues specific to the Law on Presidential Elections that should be addressed include:

- Failure to specify the procedures to be followed if only one candidate is successfully nominated as a candidate or if only one candidate remains after other candidates withdraw.

- Failure to define what is an "unsuccessful" election, which requires new elections.

- Provisions regulating a recall election of the President that require clarification.

The Law on Local Elections incorporates many of the provisions of the Law on Parliamentary Elections. Many of the shortcomings of the Law on Parliamentary Elections are applicable to the Law on Local Elections. Additional problems with the Law on Local Elections that should be addressed include:

- Failure to ensure political plurality and multi-ethnic representation in the membership of election administration bodies.
- Failure to establish a formal role for the Republican Election Commission in municipal elections.
- Failure to facilitate the representation of ethnic minorities in municipal assemblies.
- Provisions regulating a recall election of the president of the municipal assembly that require clarification.

The comments on these three election laws are provided by the OSCE/ODIHR with the goal of assisting the authorities in Serbia in their efforts to improve the legal framework for elections. The OSCE/ODIHR stands ready to provide assistance to authorities in their electoral reform efforts.

III. LAW ON PARLIAMENTARY ELECTIONS

A. ELECTION ADMINISTRATION

Articles 33 and 36 of the law establish electoral administration bodies at just two levels, the Republican Electoral Commission (REC) and the polling boards (PBs). The REC operates on a national level and each polling board conducts the election in a single polling station. Unlike the Law on Presidential Elections, the Law on Parliamentary Elections does not provide for an interim level of election administration between the REC and PBs. Past elections in Serbia have shown that there is a clear need for a formal intermediary level of election administration between the REC and the PBs. The absence of such a level of election administration can lead to logistical and organizational problems for conducting elections. Inclusion of this level of election administration will also make the Law on Parliamentary Elections consistent with the Law on Presidential Elections in the area of election administration.

In past elections the REC has set up a number of *ad hoc* "working groups" which, in effect, provided an intermediary level of co-ordination between the REC and the PBs. However, it is important that this situation is formally established in the law. Amendments are needed to ensure that the powers, functions and responsibilities of the intermediary electoral commissions are clearly defined, the commissions are properly accountable and work with adequate transparency safeguards, and that there is broad political participation and/or monitoring of their work. This provides a greater degree of political pluralism by creating the possibility for multi-party representation at all levels of the election administration since *ad hoc* "working groups" do not currently have to satisfy the law's requirements for extended political party membership of election commissions. The **OSCE/ODIHR and the CoE/VC recommend** that the law be amended to include intermediary electoral commissions with adequate transparency safeguards and broad political participation.

The REC and PBs operate with permanent and extended members. Political parties and other submitters of candidate lists are entitled to nominate a single representative in the extended composition of the REC and of each PB. These members appear to have equal voting rights with members of the permanent composition. They participate in the work of the REC and the PBs just for the duration of the election campaign and the processing of results.[5] Article 29 of the law

[5] A democratic election consists of more than the technical exercises of casting and counting ballots. Certain minimum elements of political pluralism must exist in national life and state institutions in

prohibits any political party, coalition, or political organisation from having more than half its members in the permanent composition of the REC or PBs. Decisions are made by a majority of the members.

The 17 members of the permanent composition of the REC are appointed for a term of four years by the National Assembly. Each member of the REC has a deputy. Articles 34(8) and 36 provide that the permanent composition of each PB comprises three members appointed by the REC.

All members of electoral commissions should be guaranteed the opportunity to participate in full in the administration of the election. Such guarantees are particularly important for members appointed in the extended composition of the REC and PBs. In order to provide such guarantees, the law should establish the right of all members to be timely notified of sessions, provided with full access to election documentation, and to attend and participate on an equal basis in all sessions. As none of these rights are expressly stated in the law, the **OSCE/ODIHR and the CoE/VC recommend** that the law be amended to include express guarantees of these rights for election commission members.

Articles 55 and 69 of the law identify various circumstances in which a PB can be dissolved on polling day. These include such instances as where a member of a polling board fails to re-explain the voting procedure when requested or where there has been campaigning within 50 metres of the polling station. Such failures do not justify the draconian response of disbanding the PB. The **OSCE/ODIHR and the CoE/VC recommend** that the law be amended to limit the power to disband a PB to the situation where a violation is serious and may have had an impact on the overall integrity of the election, and only following a formal complaint about the violation.

B. TRANSPARENCY

The law includes some safeguards designed to promote transparency and openness in the preparation and conduct of parliamentary elections, including the following:

- Article 60 of the law provides that submitters of candidate lists are permitted to have a representative monitoring the printing of the ballot papers.

- A copy of the results at the polling station is required, under Article 76, to be displayed at the polling station.

- Each representative of a list submitter at a PB is entitled to a copy of the PB results protocol. Representatives for the four list submitters with the highest voting results are entitled to a protocol immediately. Other list submitters are entitled to a protocol within 12 hours.

- Article 79 permits submitters of candidate lists to inform the REC of the name of a person authorised "to be present at the statistical processing of data" at the REC.

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order for there to be genuine democratic elections in a state. OSCE member states affirm this principle of pluralism. *See* 1990 Copenhagen Document, 1990 Paris Document, 1991 Moscow Document, 1992 Helsinki Decisions, 1994 Budapest Summit Declaration, 1994 Budapest Decisions, 1996 Libson Summit Declaration, and 1999 Istanbul Charter for European Security.

Although the above safeguards are provided in the law and Article 32 of the law states that the "work of election administration bodies shall be public", the law makes no provision for the participation of either international or non-partisan domestic observers. Thus, the law fails to implement the OSCE commitment to provide for election observation.

Paragraph 8 of the 1990 OSCE Copenhagen Document provides:

> "The participating States consider that the presence of observers, both foreign and domestic, can enhance the electoral process for States in which elections are taking place. They therefore invite observers from any other CSCE participating States and any appropriate private institutions and organizations who may wish to do so to observe the course of their national election proceedings, to the extent permitted by law. They will also endeavor to facilitate similar access for elections proceedings held below the national level. Such observers will undertake not to interfere in the electoral proceedings."

This commitment requires OSCE participating States to ensure that observers have the right to inspect documents, attend meetings, and observe election activities at all levels, and to obtain copies of decisions, protocols, tabulations, minutes, and other electoral documents during the entirety of the election processes, including processes before and after election day. Further, observers should receive appropriate credentials a sufficient period of time prior to elections to enable them to organize their activities effectively. Observers should be given unimpeded access to all levels of election administration, effective access to other public offices with relevance to the election process, and the ability to meet with all political formations, the media, civil society, and voters.

The **OSCE/ODIHR and the CoE/VC recommend** that the legal framework be amended to permit international and domestic observers to observe all election processes, including voting in polling stations, counting of ballots, and tabulations of the results. Further, the rights of domestic and international non-partisan observers should be guaranteed in the law, and criteria for their accreditation should be stipulated clearly.

Article 85 of the law requires the REC to publish the results of the elections. However, Article 85 does not require the REC to publish a table showing the PB results broken down for each polling station. A table of results showing the breakdown for each polling station allows the parties to ensure that the results are correctly entered from the polling station results protocol. The **OSCE/ODIHR and the CoE/VC recommend** that Article 85 be amended to require the REC to include detailed results for each polling station in the publication of the election results. Further, these detailed results should categorize all types of ballots, including ballots cast by mobile ballot boxes, in order to allow electoral participants and observers to determine whether a particular voting method may have been manipulated.

C. SUFFRAGE

Article 42 of the Constitution of Serbia provides that a citizen who has reached the age of eighteen years shall have the right to vote and to be elected to the National Assembly and to other agencies and bodies. Article 10 of the Law on Parliamentary Elections places further restrictions on the passive and active voting right: a (Serbian) citizen must be a Yugoslav citizen, must have "business capacity" and must be permanently resident in the Republic of Serbia.

D. VOTER LISTS

Article 12 of the Law on Parliamentary Elections requires computerised voter lists to be kept by municipal authorities as part of a central system. The law recognises the right to inspect and request alterations to the voter lists and provides some detailed rules on the inclusion of voters' details and the correction of errors. Voters are permitted to challenge a refusal to correct the voter list in a court.

Although Article 12 provides that the voter list is a "public document", it does not include specific provisions for the public display of voter lists well in advance of the election. The **OSCE/ODIHR and the CoE/VC recommend** that such provisions should be included in the law to ensure greater accuracy of voter lists and to reduce the need for last minute challenges. These provisions should require voter lists to be publicly accessible at polling stations in advance of an election, not only for voters, but for political parties as well. However, safeguards should be included to protect citizens' right to privacy.

Although the law provides for a "central system" that "connects" all municipalities, it does not designate a State body with clear responsibility for the maintenance of the central system. Overall responsibility and authority for its maintenance should be given to a single State body. Civil records held by municipalities in electronic form should be maintained using a single uniform software throughout the Republic. Links should be created between municipalities in order to allow for the verification of errors or duplicates in civil records. The provision in Article 12 that requires the State Administration Minister to issue more detailed rules for updating is not sufficient to achieve this purpose. The **OSCE/ODIHR and the CoE/VC recommend** that the law designate a State body will clear responsibility for the maintenance of a central voter list.

E. CANDIDACY

The Parliament (National Assembly) of Serbia is a unicameral body and consists of 250 members directly elected by secret ballot for a term of four years. Article 4 of the law provides that members of the National Assembly are elected under a proportional representation list system in a single republic-wide constituency. Lists of candidates may be submitted not only by political parties, coalitions, and other political organisations but also by groups of citizens. The law does not define what organizations qualify as "political organizations". Nor does the law define the number of persons or process for constituting a "group of citizens". The **OSCE/ODIHR and the CoE/VC recommend** that the law be amended to state the legal criteria for both so that it can be determined whether a nomination by such an "organization" or "group" is valid.

In order to be registered a list must be supported by 10,000 voters' signatures. Article 43 provides that every signature must be authenticated in a municipal court, for which a fee will be charged. However, Article 43 does not specify the procedures for authentication of signatures. The **OSCE/ODIHR and the CoE/VC recommend** that the law be amended to specify the procedures for authentication of signatures.

It is strongly recommended that the law provides a clear indication of what kind of authentication is envisaged. It is possible to submit signature lists to varying degrees of scrutiny, from checking for errors on the face of the document (e.g. counting the number of signatures or ensuring that the voter's details appear next to the signature) to checking with voters to confirm that they did sign the list. The inclusion in the law of criteria for checking signature lists would

not only provide a uniform system of scrutiny for all parties and lists; it would also avoid the use of arbitrary criteria as a means of excluding a particular list.

The Law on Parliamentary Elections does not include any express prohibition of lists with just one, independent, candidate. However, such a candidate would require the support of a "group" of citizens in order to be nominated. Although the "group" could be composed of a few individuals, the "group" nomination requirement does limit the ability to seek office as an independent candidate. Paragraph 7.5 of the 1990 OSCE Copenhagen Document includes an express commitment to allow citizens to seek political office as representatives of political parties *or individually*. The **OSCE/ODIHR and the CoE/VC recommend** that the law be amended to expressly provide for self-nomination by an individual independent candidate. Such a candidate should also be required to submit a number of supporters' signature, however, considerations should be given to require less signatures than from political party lists as independent candidates have usually less ability to collect signatures than political parties. Further, Article 81 of the law should be amended to account for independent candidates in the allocation of mandates, particularly in regard to the 5per cent legal threshold, which should not be applicable to an independent candidate.

F. ALLOCATION OF MANDATES

The allocation formula stated in Article 82 is the system commonly known as the d'Hondt model. This method is employed in a number of established democracies. However, Article 81 provides that mandates are only allocated to a candidate list if sufficient votes have been cast for that list to meet the threshold set out in the law (5per cent of the "votes of voters who have voted"). It is not clear whether this 5per cent is determined by referring to the number of signatures on the voter list, by counting the total number of ballot papers in the ballot boxes (valid or invalid) or by some other means. The **OSCE/ODIHR and the CoE/VC recommend** that Article 81 be amended to provide that the 5per cent is of the total number of valid votes cast.

The above recommendation would constitute a change in the method of allocation used by the REC in past elections, where the REC has determined that the threshold is calculated on the number of signatures on the extract of the voter register in each polling station. This allows for all votes, including invalid ones, and voters who received a ballot but did not cast it, to influence the allocation of seats. As a result, such a provision also effectively raises the 5 per cent threshold in proportion to the number of invalid ballots cast. Theoretically, a party may receive over 5 per cent of valid votes cast but may fall short of this threshold if all signatures on the extracts are used as a basis for calculating the threshold. In this case, citizens who did not express a clear political preference would directly influence the composition of the new parliament. Thus, the 5per cent threshold for gaining parliamentary representation should be calculated on the basis of valid votes cast, not based on the number of signatures on the voter lists.

Article 81 creates an exception to the 5per cent threshold for "political parties of ethnic minorities and coalitions of political parties of ethnic minorities". These political parties and coalitions participate in mandate allocation even if they receive less than 5per cent of the votes. However, the law does not include a definition of "political party of ethnic minority". Such a definition is necessary in order to determine which political parties and coalitions under the 5per cent threshold are entitled to participate in the allocation of mandates. The **OSCE/ODIHR and the CoE/VC recommend** that Article 81 be amended to include such a definition.

Article 40a of the law provides that "for every four candidates on the electoral list (first group of four places, second group of four places and so on until the end of the list) there shall be one candidate of the gender less represented on the list, and the number of candidates of the gender less represented on the list shall be at least 30per cent of the total number." If an electoral list does not meet this requirement, then it is deemed incomplete and the submitter is given the opportunity to remedy the deficiencies of the list within 48 hours after the list is returned to the submitter. If the submitter does not remedy the deficiencies, then the list is rejected. Article 40a is a positive provision in the law that should facilitate the participation of women in the National Assembly and elections. However, there appears to be a translation error in the text as one of every four candidates would be 25per cent instead of 30per cent. The text "and so on until the end of the list" means that the 25per cent would apply "until the end of the list", which means that the text "at least 30per cent of the total number" would appear to create an inconsistency. The **OSCE/ODIHR and the CoE/VC recommend** that the original language text be checked and that it is verified that the two principles stated in Article 40a are mathematically consistent.

Article 84 of the law allows a party to arbitrarily choose which candidates from its list become members of parliament, *after the elections*, instead of determining the order of candidates beforehand. This limits the transparency of the system and gives political parties a disproportionately strong position vis-à-vis the candidates. Under proportional representation systems, the order on the list usually determines the allocation of mandates; otherwise, mandates are allocated on the basis of preferential votes for candidates. The current Serbian system results in voters not knowing which candidates are likely to be seated as a result of their support for a particular party. The **OSCE/ODIHR and the CoE/VC recommend** that the law should be amended to oblige political parties and coalitions to determine and announce the order of candidates on their list *before the elections*, rather than allowing them to choose after election day which candidates will be awarded mandates.

Following the Constitutional Court decisions, the parts of Article 88 providing that a mandate of an elected member of parliament shall expire if s/he ceases to be a member of the political party or coalition on whose candidate list s/he was elected, do no longer exist. [6] This rule raised obvious problems. Once elected, deputies should be accountable primarily to the voters who elected them, not to their political party. This flows from the fact that they hold a mandate from the people, not from their party. The fact that a deputy has resigned from or has been expelled from the party should therefore not entail their expulsion from parliament. Furthermore, such a provision contradicted Paragraph 7.9 of the 1990 OSCE Copenhagen Document. The **OSCE/ODIHR and the CoE/VC recommend** that should the law be amended in this area in the future, new provisions should ensure that mandates of elected representatives belong to them and not to political parties on which lists they were elected.

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[6] The Constitutional Court of Serbia decided, on 27 May 2003, that paragraphs 1 and 9 of Article 88 were unconstitutional. The Court's decision addresses this issue of whether a mandate belongs to the elected deputy or the political party of which the deputy was a member. According to the Constitutional Court's decision, supplemented by a subsequent decision on 25 September 2003 on the same issue regarding mandates in municipal assemblies, termination of membership in a political party cannot be ground for revoking an elected deputy's mandate.

G. CAMPAIGN FINANCE

Campaign finance was formerly regulated by Article 103 of the Law on Parliamentary Elections. Article 103 has been superseded by the 2004 Law on Financing of Political Parties, which regulates campaign financing of presidential, parliamentary and municipal elections, and introduces a much more stringent framework for party and campaign finances as a whole. The 2004 Law on Financing of Political Parties sets limits on political party expenditures and individual contributions to political parties. While the introduction of this new law is a welcome step towards increasing transparency and accountability in political party finances, the OSCE/ODIHR EOM report on the 2004 Presidential Election indicates that its implementation was a source of controversy. Several points in the law were interpreted differently by the candidates and the Ministry of Finance. This resulted in a heated political debate and legal action being filed against the Ministry of Finance.

The most controversial point in the Law on Financing of Political Parties is the provision (Article 9) for determining the amount of state funds to be disbursed for campaign finance purposes. According to the OSCE/ODIHR EOM report on the 2004 Presidential Election, the Finance Ministry interpreted Article 9 as granting it discretion in determining the amount of campaign funds to be released by the Ministry for a single election. The Ministry took the position that it had *discretion for determining the amount for a single election* because Article 9 sets the total amount for *all elections to be held in a budget year*. This interpretation of the law, that attributes to the Ministry the task of setting the total of campaign funds for a single election, gives considerable discretionary power to the government and constitutes a potential advantage to incumbent candidates. Further, the English translation of the text reviewed does not clearly support this interpretation. The **OSCE/ODIHR and the CoE/VC recommend** that Article 9 be amended to clarify this issue and to specifically state the intent of the legislature in language that is not subject to different interpretations.

Under the new law, the amount approved for campaign financing from state sources also determines the maximum amount of privately donated funds which political parties and candidates can spend on campaigning. The law also envisages penalties for candidates who spend in excess of the limit. As limits on private funding are determined by the Article 9 public funding, it is critically important that Article 9 be amended as recommended above.

Article 10 of the law foresees that 20 per cent of the approved sum to cover campaign expenses is to be equally divided among all the registered candidates, with the remaining 80 per cent going to the winner of the seat(s). One evident shortcoming of the law is that it makes no distinction between allocation of funds for an election under the proportional system (*i.e.* parliamentary or municipal assembly) or a majoritarian system, such as a Presidential election. In fact, Article 10 would appear to be designed entirely for the proportional system, allocating the greater share of the funds to political parties that succeed in winning seats in an election. There is a large disparity in the case of a Presidential election, where only 20 per cent is distributed among all participants and 80 per cent goes to the winning candidate. Furthermore, the losing candidate in a second round is further disadvantaged, having to incur more expenses than other unsuccessful first-round candidates who are allocated the same amount of funds.

The **OSCE/ODIHR and the CoE/VC recommend** that campaign financing for Presidential elections should be regulated separately in a different section or article of the Law on Financing of Political Parties. Distribution of campaign funds for Presidential elections should be regulated in a manner different from that applied in Article 10 for parliamentary elections.

According to the Law on Financing of Political Parties, two distinct bodies are responsible for overseeing its implementation. The Parliamentary Finance Committee oversees the regular political party finance side, while the REC is responsible for auditing the financial reports of campaign expenses that must be presented after the certification of final election results. As there may be different interpretations of whether a particular contribution or expenditure is election campaign related, it would be better to have one regulatory authority for oversight of all political party finances, including those during an election campaign. The **OSCE/ODIHR and the CoE/VC recommend** that consideration be given to amending the law to vest in one body the responsibility for the law's implementation.

H. MEDIA

The provisions in the Law on Parliamentary Elections dealing with access to the media are rather brief and leave too much of substance to be dealt with in subordinate acts or by the supervisory board envisaged in Article 100. Although Article 5 of the law states it is the duty of the media to ensure equal representation in information among all the submitters of candidate lists, the law does not provide sufficient guarantees for equal access to media and makes no distinction between state and private media.

The omissions of Article 5 of the Law on Parliamentary Elections have been partially addressed with the enactment of a new Broadcasting Law in 2002, which establishes *some* parameters for *broadcast media* conduct. However, this law does not address any of the omissions of the Law on Parliamentary Elections related to print media.[7] Further, unlike the 2004 Law on Financing of Political Parties, which expressly superseded the campaign finance provisions of the Law on Parliamentary Elections, the 2002 Broadcasting Law makes no reference to existing media provisions in the Law on Parliamentary Elections. Thus, it would appear that there are two applicable laws for regulating media in the campaign. The provisions of these two laws are not consistent, particularly in regard to the designating which body has ultimate authority over media conduct during an election.

The 2002 Broadcasting Law established the Republican Broadcasting Agency (RBA) to supervise and regulate the activities of broadcasters. In the 2004 Presidential election, the Council of the RBA issued, pursuant to its power, General Binding Instructions for treatment of the candidates on state-owned and private broadcast media.

According to the 2004 RBA Binding Instructions, the state-owned electronic media was required to provide free-of-charge and equal broadcasting time for all the candidates. Private broadcasters were given the right to define the format and extent of their coverage of the campaign. However, if private broadcasters decided to provide candidates with free-of-charge time, then such time had to be equally distributed among all the candidates. Candidates also had

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[7] As examples, the Law on Parliamentary Elections gives no indication of whether free space in print media must be provided to political parties or candidates, or whether paid political advertisements must be offered to all electoral contestants at the same rates with the same terms and conditions.

the right to place paid advertisements in the broadcast media and broadcasters were obligated to provide the candidates with equal opportunities for placement of advertisements.

Although the 2004 RBA Binding Instructions set forth acceptable principles, they added to the confusion as to what law controls media conduct during elections and which body has primary authority over media during an election campaign. Further, the need for these instructions underscores that the legal framework does not provide sufficient detailed regulation of media conduct during an election campaign.

The **OSCE/ODIHR and the CoE/VC recommend** that the Law on Parliamentary Elections and the 2002 Broadcasting Law, be amended to clarify the roles of the Article 100 supervisory body and the Council of the Republican Broadcasting Agency during elections. It should clearly be stated which institution has authority to issue rules for the conduct of media during elections and to sanction media for violations. Consideration should be given to the removal of those provisions in the election legislation which are superseded by provisions in the Broadcasting Law in order to ensure more consistency in the legal and regulatory framework for media conduct during a campaign.

I. VOTING AND COUNTING

Article 23 of the law requires the body responsible for maintaining the voter list to issue "certificates of suffrage". It would appear that these are required by those seeking inclusion on a candidate list (Article 44) but not by voters on polling day. However, Article 72a requires "certificates of suffrage" for persons voting by mobile ballot box. Thus, it is not clear what other purposes are intended for these certificates. The **OSCE/ODIHR and the CoE/VC recommend** that the law be amended to clearly state the purposes, when needed, and procedures for issuing, obtaining, and surrendering to election administration authorities a "certificate of suffrage".

Article 58 of the law includes an express prohibition on the presence of unauthorised persons in a polling station. Police officers may only enter a polling station to restore order when invited in by the president of the PB and only if peace and order at the polling station have been disturbed. This is a positive provision in the law.

As noted previously, several articles in the law require disbanding of the PB and holding *repeat voting* for less significant infringements of the law. This includes such instances as where a member of a polling board fails to re-explain the voting procedure when requested or where there has been campaigning within 50 metres of the polling station. It also includes a situation where the number of ballot papers found in the ballot box is later found to be greater than the number of persons who voted. The requirement for repeat voting where less significant infringements occur, and where it is clear that the infringement has not affected the determination of the winning candidates (*i.e.*, the number of ballots in the ballot box could not mathematically result in a change in the allocation of mandates) is an extreme response to the irregularity. The **OSCE/ODIHR and the CoE/VC recommend** that Articles 55, 69, and 74 of the law be amended so that repeat voting is not required if the number of ballots involved are of an insufficient number to affect the determination of the winning candidates.

Article 68 provides that a voter must state the voter's name, present proof of identity, and hand over the written notification of elections which the voter received. However, Article 68 does not state what documents are acceptable for establishing proof of identity. Nor does Article 68 address the situation where a voter did not receive or has lost the written notification of

elections. The **OSCE/ODIHR and the CoE/VC recommend** that the law list the forms of identification which are sufficient to establish a voter's identity. Further, it is recommended that the law should clearly state that failure to present the written notification of elections should not prevent a voter from voting.

Article 72a introduces mobile voting as an optional voting procedure. One concern with this article is that it permits a request for mobile voting to be made as late as 11:00 hours on election day. The possibility to make such a late request for mobile voting is unreasonable, creates the opportunity for fraud, and places a substantial burden on election administration. Additionally, should the law be amended to provide for observers, this provision could hinder observation efforts. Further, this article does not limit the grounds for mobile voting to physical incapacity, infirmity, or some other reason that prevents a voter from physically travelling to the polling station. **The OSCE/ODIHR and the CoE/VC recommend** that Article 72a be amended to: (1) require all requests for mobile voting be based on the fact of physical incapacity, infirmity, or some other valid reason that prevents a voter from physically travelling to the polling station, (2) provide a deadline of three days before election day for requests in order to allow for election administrators and observers to plan accordingly, (3) state that all procedures for identifying a voter, issuing and marking a ballot, and for observation are applicable to the mobile voting procedure. Further, the number of persons who have used the mobile ballot box should be recorded in the polling station protocol and successive protocols and tabulations by election commissions.

As previously noted, Article 85 of the law does not require the REC to publish a table showing the PB results broken down for each polling station. The **OSCE/ODIHR and the CoE/VC recommend** that Article 85 be amended to require the REC to include detailed results for each polling station in the publication of the election results. Further, these detailed results should categorize all types of ballots, including ballots cast by mobile ballot boxes, in order to allow electoral participants and observers to determine whether a particular voting method may have been manipulated.

J. PROTECTION OF SUFFRAGE RIGHTS

Article 94 of the Law on Parliamentary Elections provides that electoral complaints can be lodged by a voter, candidate or authorized persons submitting the nomination of a candidate list. Complaints are submitted to the REC, which has the power to take decisions by a majority vote of its full membership. The deadline for submitting a complaint to the REC is 24 hours, which is extremely short. This relatively short timeframe for lodging complaints to the REC begins from the moment that a contested decision is taken, raising the concern that, should the complainant not receive notification of the decision in a timely manner, it may be too late to appeal to the REC. The **OSCE/ODIHR and the CoE/VC recommend** that the law be amended to extend the deadline of 24 hours to a more reasonable period of time in order to take into account any delay between the adoption of a decision and the notification of the decision to the person affected by it.

Any person affected by a decision of the REC can appeal to the Supreme Court within 48 hours. However, the law does not expressly require that a copy of the REC decision be provided to every person who is affected by the decision. The **OSCE/ODIHR and the CoE/VC recommend** that the law be amended to require that a copy of the REC decision must be immediately delivered to every person affected by the decision. The relatively short timeframe for lodging complaints to the Supreme Court begins from the moment that a contested decision

was taken by the REC, raising the concern that, should the complainant not receive notification of the decision in a timely manner, it may be too late to appeal to the Supreme Court. The **OSCE/ODIHR and the CoE/VC recommend** that consideration be given to extending the deadline of 48 hours to a more period of time in order to take into account any delay between the adoption of a decision and the notification of the decision to the person affected by it.

The law does not contain any express guarantees of a fair, public, and transparent hearing at any stage of this process. In fact, past OSCE/ODIHR EOM reports record that Supreme Court sessions on electoral disputes have been held *in camera* where the complainant is not even allowed to be present. This is clearly contrary to international standards and OSCE commitments. Proceedings on cases before the Supreme Court seeking to protect suffrage rights should be held in public and the parties to the appeal should have the right to present their case directly or through legal representation. The **OSCE/ODIHR and the CoE/VC recommend** that the law be amended to provide the following minimum guarantees for these cases:

- The right to present evidence in support of the complaint after it is filed.
- The right to a fair, public, and transparent hearing on the complaint.
- The right to appeal the decision on the complaint to a court of law.

The above are the minimum safeguards necessary to provide due process for the protection of suffrage rights.

Previous OSCE/ODIHR EOM reports raise the issue of conflicting legal provisions for the appeal of decisions of the REC. It is reported that the new Law on Courts, adopted in 2001, transfers a number of competencies that previously fell to the Supreme Court, including ruling on appeals against REC decisions. However, according to reports the Supreme Court has stated that it can continue to decide election complaints. The rationale given for this is that the Law on Parliamentary Elections is a *lex specialis* and leaves complaints in the exclusive competence of the Supreme Court. The **OSCE/ODIHR and the CoE/VC recommend** that, where necessary, the relevant legislation be amended to ensure that there is no question as to which court has the jurisdiction to decide appeals of decisions of the REC.

The law includes a range of criminal violations and penalties designed to promote and protect voters' rights. In the translation provided, Article 108 of the law punishes those who, in breach of Article 5(3), publish predictions of the results in the 48 hours preceding polling day. However, the law does not appear to identify penalties for those who engage in election campaigning during that period, which is also prohibited in Article 5(3). The **OSCE/ODIHR and the CoE/VC recommend** that Article 108 of the law should be amended to remedy this omission.

IV. LAW ON PRESIDENTIAL ELECTIONS

As already indicated, most of the legal provisions for the conduct of Presidential elections are contained in the Law on Parliamentary Elections. Article 1 of the Law on Presidential Elections expressly states that the Law on Parliamentary Elections applies "unless otherwise stated". Accordingly, most of the concerns identified above for the Law on Parliamentary Elections apply equally to the Law on Presidential Elections. However, there are a few differences that are noted below.

A. ELECTION ADMINISTRATION

Unlike the Law on Parliamentary Elections, the Law on Presidential Elections does provide for an interim level of election administration between the REC and PBs. The bodies administering Presidential elections are the REC, election commissions of the local self-government units, and PBs. This is a positive feature of election administration and should be retained.

B. ISSUES RELATED TO ELECTION AND RECALL

The President is directly elected by secret ballot for a term of five years. A second round of voting is held if none of the candidates received a majority of the votes on election day. The second round of voting is held for the two candidates who received the largest number of votes in the first round. In the second round of voting, the winner is the candidate who receives the largest number of votes, regardless of the number of voters who voted.

The Law on Presidential Elections does not address the procedures to be followed if only one candidate is successfully nominated as a candidate or if only one candidate remains after other candidates withdraw. The **OSCE/ODIHR and the CoE/VC recommend** that the law be amended to state what process is to be followed if only one person successfully obtains the necessary signatures and satisfies all other requirements for candidacy, or where only one candidate remains after other candidates withdraw.

The law requires new elections within 60 days of "unsuccessful" elections. However, it is not clear what constitutes an "unsuccessful" election since a second round winner only requires more votes than the opposing candidate. The **OSCE/ODIHR and the CoE/VC recommend** that the law be amended to define what constitutes an "unsuccessful" election.

The provisions for a recall election require more detail and clarification in particular in the area of administration of recall elections. Inter alia, the law does not address the "extended" composition of election administration and election deadlines applicable to "recall" elections. Moreover, Article 13 of the Law on Presidential Elections permits recall of the President by a majority vote of the "total number of registered voters". Article 13 should state the specific date and how the number of registered voters for the purpose of recall is determined. The **OSCE/ODIHR and the CoE/VC recommend** that the Law on Presidential Elections be amended to address these issues.

V. LAW ON LOCAL ELECTIONS

As already indicated, many of the legal provisions for the conduct of local elections are contained in the Law on Parliamentary Elections. Article 52 of the Law on Local Elections expressly states that the Law on Parliamentary Elections applies "if not otherwise prescribed by this law".[8] Accordingly, the concerns identified above for the Law on Parliamentary Elections

[8] Article 52 of the Law on Local Elections incorporates the provisions of the Law on Parliamentary Elections "related to register of electors, electoral bodies, nomination of candidates, the title composition and proclamation of electoral lists, polling stations, public information on the candidates, end of electoral campaign and proclamation of preliminary results or anticipation of the results, election material, voting, establishing and announcing electoral results, tax and contributions evasion for income paid as compensation for the work performed in the bodies in charge of elections and

apply equally to the Law on Local Elections, particularly concerning candidate nomination, transparency, media and campaign finance, forfeiture of an elected candidate's mandate, and processes for election complaints and appeals. However, there are additional concerns with the Law on Local Elections, which are discussed below.

In local government elections, voters elect councilors and presidents of municipal assemblies. These elections are direct elections on the basis of a secret ballot. The term of office for elected candidates is four years. Councilors are elected on the basis of lists of political parties, coalitions, other political organizations, and groups of citizens. An assembly president is elected in two rounds of voting should no candidate receive a majority in the first round of voting.

A. ELECTION ADMINISTRATION

There is a localised, two-tiered structure for the administration of local government elections. Municipal Election Commissions (MECs) are appointed by municipal assemblies and have sole responsibility for the implementation and co-ordination of the elections within a municipality. The permanent membership of an MEC is appointed for a four-year term. For the latter stages of the election period, the MEC membership is extended to include representatives of those political parties or coalitions that submitted an electoral list that includes at least two-thirds of the total number of councilors to be elected. The MEC appoints members of PBs, which manages the vote and count in each polling station. The PB membership is also extended to include representatives of the parties with electoral lists that meet the two-thirds threshold.

The election fails to establish a formal role for the Republican Election Commission in municipal elections. In order to ensure consistency of election administration standards, The OSCE/ODIHR and the CoE/VC recommend that consideration should be given to amending the law to provide for the Republic Election Commission to play a supervisory, advisory and co-ordinative role in municipal elections.

The Law on Local Elections fails to guarantee political plurality or balanced ethnic representation on the permanent membership of electoral administration bodies. There should be a guarantee of political plurality in the membership of the permanent composition of MECs and PBs, including representatives of those parties or coalitions that are in opposition in the appointing municipal assembly. The threshold requirement of nominating a number of candidates equal to at least two-thirds of the number of councilors in order to appoint extended members is likely to exclude smaller parties, such as those representing ethnic minorities. The **OSCE/ODIHR and the CoE/VC recommend** that the "two-thirds of seats" threshold for extended membership should be reduced or, alternatively, those parties that submit electoral lists that do not meet the threshold should be allowed to nominate joint representatives.

The Law on Local Elections is silent on the right of representatives of candidates for president of the municipal assembly to be represented as extended members. The law should be changed to allow representatives of assembly presidential candidates in the extended membership of the MEC if there is no representative of the candidate's party already included. The **OSCE/ODIHR and the CoE/VC recommend** that the law be amended to include some form of representation in the extended membership of these commissions for assembly presidential candidates.

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punishments, shall accordingly apply for the election of councillors if not otherwise prescribed by this Law."

Article 12 of the Law on Local Elections prohibits candidates for councilors from serving on election commissions. However, there are likely other persons, such as judges, members of Parliament, and candidates for president of the municipal assembly, who should be excluded from membership on an election commission as well. The **OSCE/ODIHR and the CoE/VC recommend** that Article 12 of the law be amended to provide a list of categories of persons who should not serve on an election commission due to conflicts created by the person's holding of a particular office or position.

B. ALLOCATION OF MANDATES

Articles 40 through 47 of the Law on Local Elections regulate the allocation and withdrawal of mandates. These articles set forth the same basic principles that are set forth in the Law on Parliamentary Elections and suffer from the same deficiencies and shortcomings. However, there are a few different differences that warrant discussion.

The legal threshold for participating in the allocation of mandates is 3per cent in local government elections instead of 5per cent. However, the law is not clear how the 3per cent is determined. The **OSCE/ODIHR and the CoE/VC recommend** that Article 40 be amended to provide that the 3per cent is of the total number of valid votes cast.

As noted earlier, Article 81 of the Law on Parliamentary Elections creates an exception to the legal threshold for mandate allocation for "political parties of ethnic minorities and coalitions of political parties of ethnic minorities". These political parties and coalitions participate in the mandate allocation for members of Parliament even if they receive less than 5per cent of the votes. Although Article 81 of the Law on Parliament Elections requires a definition of "political party of ethnic minority" in order to determine which political parties and coalitions under the legal threshold are entitled to participate in the allocation of mandates, the concept is a positive one that facilitates the representation of ethnic minorities. The **OSCE/ODIHR and the CoE/VC recommend** that consideration be given to providing a similar provision in the Law on Local Elections.

As noted earlier, Article 84 of the Law on Parliamentary Elections allows a party to arbitrarily choose which candidates from its list become members of parliament, *after the elections*, instead of determining the order of candidates beforehand. Article 42 of the Law on Local Elections has a similar, but not identical provision. Article 42 of the Law on Local Elections provides that one-third of the seats are allocated to the candidates according to their sequence on the list and two-thirds of the seats as determined by the political party or coalition. The **OSCE/ODIHR and the CoE/VC recommend** that Article 42 of the Law on Local Elections be amended to oblige political parties and coalitions to determine and announce the order of *all candidates* on their list *before the elections*, rather than allowing them to choose after election day which candidates will be awarded mandates.

As noted earlier, Article 40a of the Law on Parliamentary Elections requires that a certain percentage of the candidates on an electoral list be of the gender less represented on the list. Article 42 of the Law on Local Elections has a similar, but not identical provision. Article 42 requires that "every fourth seat shall be allocated to a person of less represented sex in the list" from "the remaining two-thirds of seats".[9] The gender requirement of Article 42 is less

[9] Similar to the provisions of the Law on Parliamentary Elections, if an electoral list does not meet this gender requirement, then it is deemed incomplete and the submitter is given the opportunity to remedy the deficiencies of the list. If the submitter does not remedy the deficiencies, then the list is rejected.

significant than the gender requirement of Article 40a of the Law on Parliamentary Elections. The **OSCE/ODIHR and the CoE/VC recommend** that consideration be given to harmonizing these two articles so that the gender requirements for electoral lists are consistent with each other.

C. ELECTION AND RECALL OF THE PRESIDENT OF THE MUNICIPAL ASSEMBLY

Article 61 of the Law on Local Elections permits recall procedures for the president of the municipality to begin with either (1) a motion for recall supported by signatures of at least 10per cent of the electorate in municipality or (2) a motion for recall passed by majority vote out of total number of councilors. In contrast, Article 11 of the Law on Presidential Elections requires a two-thirds vote of Parliament to support a recall motion of the President. Article 11 is more consistent with international principles, which counsel that a recall election directed at a specific office holder requires that minimum safeguards for such an election are in place to prevent the undemocratic and arbitrary removal of an elected official by a disgruntled group of voters, who may represent a minority of the registered voters within the constituency. The possibility to recall an elected candidate must be carefully balanced against the need for orderly election processes that respect the democratic principle of majority rule. The **OSCE/ODIHR and the CoE/VC recommend** that Article 61 be amended to increase the percentage of signatures required to support a recall motion and to increase the majority voting requirement in the assembly from a majority to two-thirds.

Article 62 provides that "A president of municipality shall be deemed recalled if the majority of voters who cast their ballots voted for his/her recall." Article 62 should state the specific date and how the number of voters for the purpose of recall is determined. The **OSCE/ODIHR and the CoE/VC recommend** that Article 62 of the Law on Local Elections be amended to address these two issues.

D. PROTECTION OF SUFFRAGE RIGHTS

Articles 48 through 50 of the Law on Local Elections regulate protection of suffrage rights. These articles set forth the same basic principles that are set forth in the Law on Parliamentary Elections. The shortcomings in the Law on Parliamentary Elections are also found in the Law on Local Elections. The **OSCE/ODIHR and the CoE/VC recommend** that these articles similarly be amended to provide for: (1) more reasonable deadlines for filing complaints and appeals, (2) notice to all parties affected by a decision, (3) the right to present evidence in support of a complaint after it is filed, (4) the right to a fair, public, and transparent hearing on a complaint, and (5) the right to appeal the decision on a complaint to a court of law.

The OSCE/ODIHR EOM report on the 2002 local government elections also highlighted a problem due to the failure of the law to prevent judges from serving both on an election commission and the municipal court. The highest appellate body under the election law for challenging appeals of decisions of a municipal election commission (MEC) is the municipal court. For the 2002 elections, the OSCE/ODIHR noted that the Presidents of the Municipal Courts of Bujanovac and Presevo also sat as permanent MEC members. In fact, the President of the Bujanovac Municipal Court also held the position of Vice-President of the Bujanovac MEC (and, following the resignation of the appointed MEC President, the *de facto* President). Thus, the judges of the municipal court were being asked to rule on appeals from decisions of the MEC that had been taken by their President, which raised concerns regarding possible conflict of interest.

A judge should not sit in review of a decision in which the judge participated as a commission member.[10] Safeguards must be added in the law to address the situation where members of the judiciary are also serving on election commissions. The **OSCE/ODIHR and the CoE/VC recommend** that the law be amended to either (1) prohibit judges from serving as members of election commissions or (2) requiring that a different judge is assigned to a case that is a review of a commission decision in which the regular municipal judged participated as a member.

[10] An independent judiciary is indispensable to justice in any society. A judge should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. The judicial duties of a judge take precedence over all the judge's other activities. A judge should conduct all of the judge's extra-judicial activities so that they do not: (1) cast reasonable doubt on the judge's capacity to act impartially as a judge; or (2) interfere with the proper performance of judicial duties.