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# DRAFT JOINT RECOMMENDATIONS ON THE LAWS ON PARLIAMENTARY, PRESIDENTIAL AND LOCAL ELECTIONS, AND ELECTORAL ADMINISTRATION IN THE REPUBLIC OF SERBIA

**by**
**the Venice Commission**
**and**
**OSCE/ODIHR**

**on the basis of comments by**

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## *I. INTRODUCTION*

### *1. Mandate*

*1. The present recommendations were elaborated following resolution 1320 (2003) of the Parliamentary Assembly of the Council of Europe, which invites the Venice Commission to formulate opinions concerning possible improvements to legislation and practices in particular member states or applicant countries.*[1]

*2. The following text is prepared on the basis of comments by Mr Jessie Pilgrim (OSCE/ODIHR, election expert) and Mr Hjörtur Torfason (Member, Iceland).*

*3. Subsequently, the document was submitted for comments to the Parliamentary Assembly of the Council of Europe and the Congress of Local and Regional Authorities of the Council of Europe.*

*4. This joint revised report was adopted by the Venice Commission at its … Plenary Session (Venice, …- …March 2006).*

### *2 Reference documents*

*5. The report is based upon:*

- *the Law on the elections of representatives of the Republic of Serbia (update May 2004) CDL-EL(2005)026);*
- *the Law on electing the President of the Republic of Serbia (1990 as amended 1992, 2002, 2003, and February 2004), CDL-EL(2005)025);*
- *the Law on local elections of the Republic of Serbia ("Official Gazette of the Republic of Serbia" No. 33 of 13 June 2002), CDL-EL(2005)027);*
- *Assessments of the Law on Parliamentary elections in the Republic of Serbia by OSCE/ODIHR (2000) and on the laws on parliamentary and presidential elections in Serbia (2001);*
- *the OSCE/ODIHR Election Observation Mission Reports (28 December 2003 and 13 and 27 June 2004, docs. ODIHR.GAL/13/04 and ODIHR.GAL/71/04);*
- *the report of the Ad hoc Committee of the Parliamentary Assembly of the Council of Europe on the observation of elections to the National Assembly of Serbia / Federal Republic of Yugoslavia (Doc. 8934, 22 January 2001).*

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1 *Point 11.ii.b.*

- *report of the Congress of Local and Regional Authorities of the Council of Europe on the observation of the local/municipal election in the Republic of Serbia, 19 September 2004 (1st round) doc CG/CP (11)14;*
- *report of the Congress of Local and Regional Authorities of the Council of Europe on the observation of the presidential election in the Republic of Serbia, 13&27 June 2004, CG/Bur (11) 26;*
- *report of the Congress of Local and Regional Authorities of the Council of Europe on the observation of the presidential elections in the Republic of Serbia, 16 Nov 2003 CG/Bur (10) 70;*
- *report of the Congress of Local and Regional Authorities of the Council of Europe on the local elections in Southern Serbia, 28 July 2002, CG/Bur (9) 40;*
- *report of the Congress of Local and Regional Authorities of the Council of Europe on the legislative elections in the Republic of Serbia, 28 December 2003, CG/Bur (10) 88;*
- *the Code of good practice in electoral matters adopted by the Venice Commission, including the Guidelines on Elections (CDL-AD(2002)023rev).*

## 3. General remarks

6. The comments on the three election laws of the Republic of Serbia (Serbia and Montenegro) are provided by the Organisation for Security and Co-operation in Europe's Office for Democratic Institutions and Human Rights (OSCE/ODIHR) and the European Commission for Democracy through Law (Venice Commission) with the goal of assisting the authorities of Serbia in their efforts to improve the legal framework for elections. The OSCE/ODIHR and the VC stand ready to provide assistance to authorities in their electoral reform efforts.

7. This assessment comments on the following laws of the Republic of Serbia (Serbia and Montenegro): Law on Elections of Representatives[2] (Law on Parliamentary Elections), Law on Electing the President of the Republic[3] (Law on Presidential Elections), 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

8. 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 republic-wide constituency on the basis of lists of political parties, coalitions of political parties, other political organisations, and groups of citizens.

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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.

9. 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.

10. In local government elections, voters elect councillors 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. Councillors are elected on the basis of lists of political parties, coalitions, other political organisations, 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.

11. 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

12. 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 and best practices for democratic elections.

13. Problems with the law include:

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

ii. Provisions regulating dissolution of polling boards on election day.

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

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

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

vi. Provisions for campaign finance that are not clear.

vii. Provisions for equal access to the media that could be clarified.

viii. Provisions for mobile voting that should be improved.

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

x. Inadequate provisions for the settlement of election disputes and protection of suffrage rights.

14. Following the Constitutional Court decisions, the parts of Article 88 providing that a mandate of an elected member of parliament shall expire if she/he ceases to be a member of the political party or coalition on whose candidate list she/he was elected, do no longer exist. However, consideration should be given to amending the law in this area to state clearly that mandates of elected representatives belong to them and not to political parties on which lists they were elected.

15. 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 to be found in 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:

a. Failure to specify the procedures to be followed if there is only one candidate nominated or if only one candidate remains after other candidates withdraw.
b. Failure to define what is an "unsuccessful" election, which requires new elections.
c. Provisions regulating a repeated election of the President that require clarification

16. 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 to be found in the Law on Local Elections. Additional problems with the Law on Local Elections that should be addressed include:

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

## III. LAW ON PARLIAMENTARY ELECTIONS

### A. ELECTION ADMINISTRATION

17. 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

Republic 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 organisational 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.

18. 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 Venice Commission recommend that the law be amended to include intermediary electoral commissions with adequate transparency safeguards and broad political participation.***

19. 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 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.

20. 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 with full rights in the absence of the member. Articles 34(8) and 36 provide that the permanent composition of each PB comprises three members appointed by the REC.

21. 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 notified in a timely manner of sessions,

[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 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 Lisbon Summit Declaration, and 1999 Istanbul Charter for European Security.

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 Venice Commission recommend that the law be amended to include express guarantees of these rights for election commission members.***

22. 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 meters of the polling station. Such failures do not justify the response of disbanding the PB. ***The OSCE/ODIHR and the Venice Commission recommend that the law be amended to limit the power to disband a PB to a 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

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

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

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

c. 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.

d. 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.

24. 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.

25. Paragraph 8 of the 1990 OSCE Copenhagen Document states:

> *“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 organisations who may wish to do so to observe the course of their national election proceedings, to the extent permitted by law. They will also endeavour to facilitate similar access for elections proceedings held below the*

*national level. Such observers will undertake not to interfere in the electoral proceedings.*[6]"

26. This commitment requires OSCE participating States to ensure that observers have full access to the entire election process, including 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 at all stages of the election process. 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.

27. The Venice Commission's Code of Good Practice in electoral matters provides that:

*Observation of elections plays an important role as it provides evidence of whether the electoral process has been regular or not.*

*There are three different types of observer: partisan national observers, non-partisan national observers and international (non-partisan) observers. In practice the distinction between the first two categories is not always obvious. This is why it is best to make the observation procedure as broad as possible at both the national and the international level.*[7]

28. ***The OSCE/ODIHR and the Venice Commission recommend that the legal framework be amended to permit international and domestic non-partisan observers to observe all stages of the election process, 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***.

29. 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 Venice Commission 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 categorise all types of ballots, including ballots cast by mobile ballot boxes, in order to allow electoral participants and observers to have a detailed insight as to how the results at the Republican level emerged from the polling stations.***

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6 Document of the Copenhagen Meeting of the Confer on the Human Dimension of the CSE (1990). http://www.osce.org/docs/english/1990-1999/hd/cope90e.htm.

7 CDL-AD(2002)023rev Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report - Adopted by the Venice Commission at its 52nd session (Venice, 18-19 October 2002), Part II, 3.2, page 29.

## C. SUFFRAGE

30. 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 "legal capacity" and must have registered as a permanent resident in the Republic of Serbia.

31. The voting rights are also addressed in the Constitutional Charter of the State Union of Serbia and Montenegro, whereby Article 7 states that "a citizen of a member state shall have equal voting rights and duties in the other member state as its own citizens, except for the right to vote and to be elected". Therefore, voting rights of Serbian citizens are left to be regulated by the Republic's legislation.

## D. VOTER LISTS

32. 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.

33. 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 Venice Commission 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***.

34. 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 Venice Commission recommend that the law designate a State body with clear responsibility for the maintenance of a central voter list and a relevant budget.***

## E. CANDIDACY

35. 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 organisations qualify as "political organisations". Nor does the law define the number of persons or process for constituting a "group of citizens". ***The OSCE/ODIHR and the Venice Commission 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 "organisation" or "group" is valid.***

36. 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 Venice Commission recommend that the law be amended to specify the procedures for authentication of signatures.***

37. 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.

38. 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 Venice Commission 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' signatures, 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 5 per cent legal threshold.

## F. ALLOCATION OF MANDATES

39. The allocation formula stated in Article 82 is the system commonly known as the d'Hondt method. 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 (5 per cent of the "votes of voters who have voted"). It is not clear whether this 5 per 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 Venice Commission***

***recommend that Article 81 be amended to provide that the 5 per cent is of the total number of valid votes cast.***

40. 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 5 per 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.

41. Article 81 creates an exception to the 5 per 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 5 per 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 5 per cent threshold are entitled to participate in the allocation of mandates. ***The OSCE/ODIHR and the Venice Commission recommend that Article 81 be amended to include such a definition.***

42. 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 30 per 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 40 "a" 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 25 per cent instead of 30 per cent. The text "and so on until the end of the list" means that the 25 per cent would apply "until the end of the list", which means that the text "at least 30 per cent of the total number" would appear to create an inconsistency. ***The OSCE/ODIHR and the Venice Commission recommend that the original language text be checked and that it is verified that the two principles stated in Article 40 "a" are mathematically consistent***.

43. 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 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 Venice Commission 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.***

44. Following the Constitutional Court decisions,[8] the parts of Article 88 providing that a mandate of an elected member of parliament shall expire if she/he ceases to be a member of the political party or coalition on whose candidate list she/he was elected, do no longer exist. 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 Venice Commission 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.***

## G. CAMPAIGN FINANCE

45. 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 development 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.

46. 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

[8] 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.

to incumbent candidates. Further, the English translation of the text reviewed does not clearly support this interpretation***. The OSCE/ODIHR and the Venice Commission 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.***

47. 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.

48. 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.

49. ***The OSCE/ODIHR and the Venice Commission 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.***

50. 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 Venice Commission recommend that consideration be given to amending the law to vest in one body the responsibility for the law's implementation.***

## H. MEDIA

51. 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.

52. 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.[9]

53. 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.

54. 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 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.

55. 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.

56. ***The OSCE/ODIHR and the Venice Commission recommend that the 2002 Broadcasting Law be amended to clarify the roles of the 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 amending the regulatory framework to limit the quantity of air-time that individual candidates or parties are permitted to purchase in an election campaign, thus ensuring that those parties and candidates with less resources do not suffer serious disadvantage. Advertisement slots should be clearly identified to allow voters to be aware of the political nature of the programme. Advertisement rates should be equal to all contestants.***[10]

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[9] 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.

[10] Cf. CDL-AD(2002)023rev Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report - Adopted by the Venice Commission at its 52nd session (Venice, 18-19 October 2002), Part I, 2.3, page 28.

## I. VOTING AND COUNTING

57. 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 Venice Commission 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".***

58. 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.

59. 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 meters 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 if the Republic Election Commission concludes 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 Venice Commission 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 determination of the winning candidates***.

60. 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 Venice Commission 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.***

61. Article 72 "a" 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 which places a substantial burden on election administration and could hinder observation efforts of mobile voting. 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 Venice Commission***

***recommend that Article 72 "a" 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) 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.***[11]

62. 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 Venice Commission 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

63. 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 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 Venice Commission 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.***[12]

64. 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 Venice Commission 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 Venice Commission recommend that consideration be given to extending the deadline of 48 hours to a longer 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.***

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[11] Idem I 3.2.2.1, para 40, page 34.

[12] See also CDL-AD(2002)023rev Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report - Adopted by the Venice Commission at its 52nd session (Venice, 18-19 October 2002), Part II, 3.3.

65. 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 Election Observation Mission 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.[13] 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 Venice Commission recommend that the law be amended to provide the following minimum guarantees for these cases***:

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

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

67. Previous OSCE/ODIHR Election Observation Mission 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 to the Court of Appeals and the Administrative Court 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 Venice Commission 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.***

68. 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 Venice Commission recommend that Article 108 of the law should be amended to remedy this omission.***

## IV. LAW ON PRESIDENTIAL ELECTIONS

69. 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.

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[13] See for example Code of Good Practice in Electoral Matters: Part II, 3.3.4.

### A. ELECTION ADMINISTRATION

70. 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

71. 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 Venice Commission 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.***

72. 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 Venice Commission recommend that the law be amended to define what constitutes an "unsuccessful" election.***

73. 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 Venice Commission recommend that the Law on Presidential Elections be amended to address these issues.***

## V. LAW ON LOCAL ELECTIONS

74. 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".[14] Accordingly, the concerns identified above for the Law on Parliamentary Elections

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

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.

## A. ELECTION ADMINISTRATION

75. 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 councillors 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.

76. 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 Venice Commission recommend that consideration should be given to amending the law to provide for the Republic Election Commission to play a supervisory, advisory and coordinative role in municipal elections.***

77. 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 councillors in order to appoint extended members is likely to exclude smaller parties, such as those representing ethnic minorities. ***The OSCE/ODIHR and the Venice Commission 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.***

78. 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 Venice Commission recommend that the law be amended to include some form of representation in the extended membership of these commissions for assembly presidential candidates.***

79. Article 12 of the Law on Local Elections prohibits candidates for councillors 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 Venice Commission 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

80. 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 differences that warrant discussion.

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

82. 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 5 per 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 Venice Commission recommend that consideration be given to providing a similar provision in the Law on Local Elections.***

83. 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 Venice Commission 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.***

84. 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".[15] The gender requirement of Article 42 is less significant than the gender requirement of Article 40a of the Law on Parliamentary Elections. ***The OSCE/ODIHR and the Venice Commission 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

85. 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 councillors. 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 Venice Commission 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.***

86. 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 Venice Commission recommend that Article 62 of the Law on Local Elections be amended to address these two issues.***

## D. PROTECTION OF SUFFRAGE RIGHTS

87. 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 Venice Commission 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***.

[15] 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.

88. The OSCE/ODIHR EOM report on the 2002 partial municipal 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.

89. A judge should not sit in review of a decision in which the judge participated as a commission member.[16] 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 Venice Commission recommend that the law be amended to require that a different judge is assigned to a case that is a review of a commission decision in which the regular municipal judge participated as a member.***

[16] 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.