



Strasbourg, 6 October 2009

CDL-EL(2009)013

Opinion no. 551 / 2009

Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

**DRAFT JOINT OPINION
ON DRAFT LAWS ON ELECTORAL LEGISLATION
OF SERBIA**

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

on the basis of comments by

**Mr Hjörtur TORFASON (Member, Iceland)
Mr Jessie PILGRIM (Electoral expert, OSCE/ODIHR)**

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I. INTRODUCTION

1. Mandate

1. *As part of the reform of electoral legislation in the Republic of Serbia, the Ministry for Public Administration and Local Self-government had prepared drafts on the following laws: Law on election of councillors, Law on the State Electoral Commission, and Law on the single register of voters; opinions are being obtained from competent bodies.*

2. *On the request of the Minister for Public Administration and Local Self-government, the Venice Commission and OSCE/ODIHR prepared the following opinion on the above-mentioned drafts.*

3. *The present document has been adopted by the Council for Democratic Elections at its 30th meeting (Venice, 8 October 2009) and by the Venice Commission at its 80th plenary session (Venice, 9 – 10 October 2009).*

2. Reference documents

4. *The report is based upon:*

- the Draft Law on the State Election Commission of Serbia (CDL-EL(2009)010);

- the Draft Law on the Unified Register of Voters of Serbia (CDL-EL(2009)011);

- the Draft Law on the Election of Councillors (CDL-EL(2009)012);

- the OSCE/ODIHR Election Observation Mission Reports for the Republic of Serbia (28 July 2002, 21 January 2007, 11 May 2008, and 20 January and 3 February 2008);

- Joint Recommendations on the Laws on Parliamentary, Presidential and Local Elections and Electoral Administration in the Republic of Serbia (2006) CDL-AD(2006)013; and

- 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

5. *This joint opinion of the Venice Commission and OSCE/ODIHR comments on the following draft laws of the Republic of Serbia: Draft Law on the Unified Register of Voters, Draft Law on the State Election Commission, and Draft Law on Election of Councillors. The texts relied on are unofficial English translations. This joint opinion does not warrant the accuracy of the translations reviewed, including the numbering of articles paragraphs, and sub-paragraphs.*

6. *The drafts of these Laws have been prepared under the auspices of the Ministry for Public Administration and Local Self-Government of Serbia, each of them being submitted together with an Explanatory Note. Their drafting constitutes a part of the reform of electoral legislation which has been ongoing in Serbia for some time, and all of them clearly represent a step forward in that process.*

7. *The Draft Law on Election of Councillors is intended to replace the Law on Local Elections No. 129 of 2007, which superseded the prior Law on Local Elections No. 33 of June 2002 (considered by the Venice Commission and OSCE/ODHIR in the above Joint Recommendations CDL-AD(2006)013). It regulates the election of members of the governing*

council or assembly of local self-government units (municipalities) in the country, and for each election, the respective municipality is to be divided geographically into electoral units of a number corresponding to the total number of councilors to be elected to the municipal assembly (Article 6 of the Draft Law). This involves a significant change from existing law, under which each municipality constitutes a single electoral unit, with all councilor mandates being distributed among electoral lists under the proportional system of voting, and with the nominators of each list having a prime say in the allocation of mandates won by the list. As stated in the explanatory note (Justification) accompanying the Draft Law, the major purpose of the change is to enhance the directness of the elections in line with constitutional principles and to allow greater scope for the influence of the territorial affiliation of the voters within the municipality and their attitude towards individual candidates upon the results of the elections. Pursuant to Article 180 (3) of the Constitution of the Republic, councillors of the assemblies of local self-governments of Serbia are directly elected by secret ballot for a term of four years. Under the Draft Law, as further related below, the assembly members of the local self-government units are elected from a specified number of electoral units on the basis of electoral lists nominated by political parties, coalitions of political parties, and groups of citizens. Mandates are allocated to the electoral lists on the basis of proportional representation, i.e. to lists receiving at least 5 per cent of the overall votes in a self-government unit. Lists representing national minorities are exempt from this 5 per cent legal threshold. The mandates are distributed to list candidates receiving the highest percentage of votes in their respective electoral unit.

8. The Draft Law on the Unified Register of Voters establishes a centrally-housed electronic register of voters administered by the ministry responsible for public administration. This central register of voters will form the basis of electoral lists for presidential, parliamentary, and local elections. The Draft Law replaces those provisions of the Law on Election of National Assembly Members and the Law on Elections of the President of the Republic which have regulated voter registration.

9. The Draft Law on the State Election Commission replaces the Law on Election of National Assembly Members (Official Gazette of the Republic of Serbia, No 35/00, 69/02, 57/03, 72/03, 18/04, 85/05, and 101/05), which previously regulated the composition and functioning of the Republic Election Commission. The new law will effectively disband the Republic Election Commission, and establish a new autonomous and independent State Election Commission tasked with the administration of elections throughout the Republic of Serbia.

II. EXECUTIVE SUMMARY

10. The Draft Law on the Unified Register of Voters responds to earlier recommendations by the OSCE/ODIHR and the Venice Commission, which suggested the creation of a central, and electronic, register of voters. The adoption and implementation of the Draft Law has the possibility to improve significantly the quality of voter registration throughout the Republic of Serbia. However, some provisions of the Law could be considered for further improvement. The issues involved include:

- a. A requirement that internally displaced persons register not in their place of origin, but rather in their place of temporary residence;
- b. A lack of clear provisions for making voters aware of challenges to their status in the voter register by third parties; and
- c. A lack of specific regulations on the public display of voter registers before the close of the registration period.

11. The Draft Law is an overall improvement in the electoral legislation of the Republic of Serbia, notwithstanding that it can be further enhanced with amendments.

12. The Draft Law on The State Election Commission is designed to ensure the independence and autonomy of the State Election Commission of the Republic of Serbia and consolidate its position as a professional state organ. The Draft Law takes significant steps to provide for independence and transparency in the functioning of this central electoral body. However, additional provisions in certain areas could be considered to enhance the draft law. These areas include:

- a. Provisions regarding the recall of commission members which could be clarified to ensure that a commissioner is not recalled for a minor omission;
- b. A need for more specific provisions regarding the publication of commission documents, including agendas, minutes, and decisions; and
- c. Greater detail on the content and scope of training of other state organs involved in the administration of elections.

13. The draft law clearly represents a positive step toward establishing a more independent election administration in the Republic of Serbia.

14. The Draft Law on Election of Councillors responds to several issues previously identified by the Venice Commission and OSCE/ODIHR, including changes to protect elected councillors from arbitrary forfeiture of mandates and a number of important provisions to promote democratic election practices. A changed system candidacy and mandate distribution is proposed as above note. In some respects, however, the law fails to fully comply with OSCE and Council of Europe commitments and international standards and best practices for democratic elections. Problematic areas of the Draft Law include:

- a. Failure to provide for participation in the electoral process of both international and nonpartisan domestic observers;
- b. Requirements for the production and verification of signature lists in support of a candidate list that appear to require clarification;
- c. Provisions for voter education, including information through mass media, that should be clarified and expanded;
- d. A lack of clear safeguards respecting mobile voting;
- e. A hybrid mandate distribution system, which could result in anomalies that undermine the will of the voters in a particular electoral unit by tying mandate distribution in respect of the electoral unit to overall vote totals in the local self-government unit;
- f. Potentially overly short filing periods for election disputes related to the protection of suffrage rights; and
- g. Potentially inadequate provisions to ensure female representation in local self-government.

15. Despite the above shortcomings, which do require correction, the draft law is an overall improvement in the electoral legislation of the Republic of Serbia.

III. DRAFT LAW ON THE UNIFIED REGISTER OF VOTERS

16. The Draft Law on the Unified Register of Voters provides for a permanent central register of voters in the Republic of Serbia. This voter register is housed electronically with the ministry responsible for public administration. This improvement responds to previous recommendations of the Venice Commission and the OSCE/ODIHR. Under these new provisions, the ministry responsible for public administration is responsible for the overall upkeep of this voter registration system. Additionally, information will be collected from municipal/town administrators and the ministries responsible for justice and defense as necessary (Arts. 5, 19.6). The adoption of a central electronic register of voters can substantially contribute to the accuracy of registers and ensure data on voters remains current.

17. The Venice Commission and the OSCE/ODIHR are pleased to note that voters residing abroad have been provided with the opportunity to register to vote (Art 16). In addition, the Draft Law on the Unified Register of Voters is commendable for provisions which ensure that all citizens which reach voting age on or before the election date are included in the register (Art. 4), and that there are administrative procedures, including the opportunity for judicial review, for the filing and adjudication of complaints regarding register data (Arts. 10.1, 13). However, despite the strengths of this Draft Law, there are a few areas where it could still be improved.

18. According to Article 6 of the draft, voters are registered according to their permanent residence, or upon the voter's request, according to a place of temporary residence in the country. The adoption of this provision can ensure that all eligible citizens are provided the right to vote, free from unnecessary burden. However, the Republic of Serbia might consider stipulating a minimum length of residency which all voters registering at a temporary address must comply with in order to vote in the local elections of that area. In accordance with the Venice Commission Code of Good Practice in Electoral Matters, such a time requirement may be put into place for local elections to ensure the electorate is truly representative of the electoral area. However, such a limit should not exceed six months.¹ Further, such a requirement would be limited in scope to local elections.

19. In general, while voters are provided an option of voting in places of temporary residence, Article 6.3 requires internally displaced persons (IDPs) to vote in the place in which the person is registered as an internally displaced person. While specific provisions for the registration of IDPs is notable and responds to recommendations previously made by the OSCE/ODIHR,² a requirement which does not allow IDPs to register in their place of origin or permanent residence appears to limit the voting rights of these citizens. The Venice Commission Code of Good Practice in Electoral Matters makes clear that the obligation to provide for the free movement of citizens requires States to take steps to allow for IDPs to vote in their place of original residence.³ IDPs, like other citizens, should be allowed the opportunity to vote in a place of permanent residence, particularly for elections at a local level.

20. Article 12 defines the process by which citizens may request that a change be made to the Register of Voters. In accordance with this Article, a citizen may request such a change in regard to the inclusion, exclusion, or amendment of register data concerning "he or

¹ Venice Commission Code of Good Practice in Electoral Matters CDL-AD(2002)23; § I.1.1.c.

² OSCE/ODIHR Limited Election Observation Mission Report, Republic of Serbia Early Parliamentary Election 11 May 2008 (Warsaw 29 August 2008), at page 23.

³ Venice Commission Code of Good Practice in Electoral Matters CDL-AD(2002)23; Explanatory Report § I.1.1.6c.

another citizen.” Such a provision is in line with accepted electoral best practice and is crucial to ensuring the voter register remains current and correct. However, the Article should be amended to require that voters be notified of requests for changes regarding their status in the voter register filed by third parties. This requirement will ensure that citizens are aware of their voting status, and are able to respond to requests for changes which they believe to be unfounded. **The OSCE/ODIHR and the Venice Commission accordingly recommend that the law be amended to clarify that voters be notified of requests to change the status of their personal data as entered in the voter register.**

21. The Draft Law on the Unified Register of Voters requires that voter registers be made public and accessible at the level of local-self government one day after elections have been called (Art. 14). The Law provides for information about the availability of voter registers to be distributed via the media and additional sources, as necessary. However, there is no specific requirement for the public display of the voter register at the local level, with Article 14 leaving such specific regulations to be prescribed by the minister responsible for public administration. As was previously recommended in the 2006 Joint Recommendations (para. 33), **the Venice Commission and OSCE/ODIHR recommend that provisions for public display well in advance of the election date be included in electoral legislation as a tool to ensure greater accuracy of voter registers and reduce the need for last minute changes. These provisions should require voter registers to be publicly accessible at polling station 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.**

22. Article 7.2 of the Draft Law on the Unified Register of Voters requires that names of voters who are members of national minorities be entered into the voter register both in Cyrillic script as spelled in Serbian and also in the script and spelling of the relevant language of the national minority. It may be assumed that this provision has been included to ensure that members of national minorities are able to verify their inclusion on the appropriate voter register. However, some members of a national minority may prefer not to have their entry spelled in the relevant national minority language in order to protect their privacy or simply because they prefer not to be identified with a national minority. It would be preferable to provide such a voter the option of having the voter’s entry printed in Cyrillic only should this be the desire of the voter.

23. The ministry responsible for public administration closes the voter register 15 days prior to the election day (Art. 17). Effective as of the closing of the voter register, the municipal/town administration may not enter changes into register data. However, after the closing of the register changes may be made by the ministry responsible for public administration up to 72 hours prior to the election (Art. 10.1). These provisions are in line with best practices, which provide for a relatively long period for registration of voters, but recognize the need to finalize the voter register prior to election day.⁴

IV. DRAFT LAW ON THE STATE ELECTION COMMISSION

24. The Draft Law on the State Election Commission replaces the Republic Election Commission with a new autonomous and independent state body to organize and conduct elections. The State Election Commission is to be made up of nine permanent members proposed by an eleven member Appointments Committee composed of prominent experts nominated by different institutions and by NGOs, and elected to office by the National Assembly of the Republic of Serbia. The Appointments Committee will determine the procedure for the selection of candidates from among applicants fulfilling the required

⁴ Venice Commission Code of Good Practice in Electoral Matters CDL-AD(2002)023; Explanatory Report § I.1.2.7iv.

professional qualifications. The members of the Commission are to be elected for seven year terms, with the possibility for re-election (Art. 3.2).

25. The mandate of a seven years is consistent with the proposed concept for composition of the Commission and does imply that the election of commissioners will not coincide with an electoral period. The provision for this term and several other provisions of the Draft Law, are aimed at ensuring the independent functioning of the commission free from political influence. Such other provisions designed to ensure autonomy include Article 5, which sets out the professional requirements for commission members, Article 4, which makes the selection of the commission's president and vice president an internal decision, and Articles 7 and 8, which limit the right to serve on the commission to citizens without a conflict of interest such as party membership or other public functions. **The Venice Commission and OSCE/ODIHR note these provisions as positive measures, aimed at facilitating the establishment of an independent and autonomous election commission, and urge special attention to be paid to their implementation and effectiveness in practice.**

26. While the Draft Law takes significant measures to professionalize the State Election Commission, some additional points could merit consideration and possible amendment. These issues are described in more detail below.

27. Article 4.2 of the draft law states that "A member of the Commission may be elected president or vice-president of the commission twice consecutively." This provision implies that a member should *only* serve as president or vice president twice consecutively; a requirement that can help ensure the commission remains independent and avoids an undue concentration of power in the hands of one commission member. **The Venice Commission and OSCE/ODIHR recommend that the original version of the text be reviewed and, if necessary, the word 'only' be inserted into Article 4.2 to clarify the meaning of this provision.**

28. Article 10 notes the specific instances in which a member of the Commission may be recalled by the National Assembly. The specific nature of these circumstances can limit the possibility for members to be arbitrarily removed, thus decreasing the likelihood of undue political influence upon members. To further strengthen the Article, the first circumstance articulated in paragraph two, "When a Commission member performs his/her duty unconscientiously," should be clarified. In its current state, the vague nature of this circumstance increases the potential for its misuse. **The Venice Commission and OSCE/ODIHR recommend that this provision be clarified so that minor omissions, as opposed to violations of law, are not a ground for recall.**

29. Sessions held by the State Election Commission are required to be public (Art. 13.2). Transparency could be further ensured by specific requirements for public notification of the commission's schedule and the posting of documents related to the commission's functioning. In line with previous OSCE/ODIHR election observation mission reports,⁵ **the Venice Commission and OSCE/ODIHR consider that the transparency of the work of the State Election Commission could be enhanced through the publication of the agenda, minutes of meetings and decisions on the commission's website.**

30. Article 18 requires that the State Election Commission conduct training for members of organs tasked with the conduct of elections. Article 18 could be enhanced by stating the minimum areas that must be covered by the training, the nature and scope of such trainings, and the expected outcome for training in order to ensure that election administrators at all levels are adequately prepared to fulfill their responsibilities.

⁵ OSCE/ODIHR Limited Election Observation Mission Final Report Early Parliamentary Elections 11 May 2008, page 23 (§VIII.B.13); Final Report Presidential Election 20 January and 3 February 2008, page 18 (§VIII.D.14).

27. It remains to be noted that the Draft Law provides for the establishment of a Technical Office of the State Election Commission, managed by a Technical Office Director selected by the Commission members. It is to be hoped that this indicates that the Commission will be able to rely on strong supporting facilities in the fulfillment of its duties.

V. DRAFT LAW ON ELECTION OF COUNCILLORS

A. ELECTION ADMINISTRATION

28. There is a localized, two-tiered structure for the administration of local government elections. Electoral commissions of the local self-government unit are appointed by the local assembly and have responsibility for the implementation and co-ordination of the elections within a local self-government unit. During the electoral period the membership of an electoral commission at this level is expanded from its permanent members to include representatives of those political parties or coalitions that submitted an electoral list in at least one third of the total number electoral units in the local self-government unit (Art. 12.2). The electoral commission appoints members of polling boards, which manage the vote and count in each polling station.

29. Pursuant to Article 12, the permanent (appointed) membership of the local electoral commissions is to consist of a President and not less than four other members, and a Secretary also appointed by the municipal assembly, together with a deputy for each of them, and Article 12.7 provides that the President and Secretary and their deputies shall have a degree in law. The Draft Law does not clearly indicate the term of office or duty for this permanent membership, in Article 12 or elsewhere. **The OSCE/ODIHR and the Venice Commission recommend that consideration be given to amending the law in order to specify the term of commission members, and whether the requirement for the the President and Secretary and their deputies of the electoral commission to have a degree in law is reasonable in this particular case.**

30. The Draft Law does not establish a formal role for the State Election Commission in municipal elections, to a certain extent, such as in Article 45.4, which requires the State Election Commission to announce the election results or issue certificates should the local election commission fail to do so, and in Article 16.4, which similarly provides that if the local electoral commission fails to perform actions within its scope of competence ahead of the prescribed deadline, the State Commission shall be authorized to assume and perform such actions. Further, pursuant to Article 16.1, the local electoral commission shall in its work apply instructions and other acts of the State Election Commission "relating to the election of councillors accordingly", and Article 16.2 obliges the State Commission to provide explanations on the implementation of laws and other general acts regulating the election of councillors upon request by the local commission. As the wording of 16.1 appears likely to be derived from the text of prior laws providing for an obligation to follow acts and instrumentations of the State Commission relating to the election of members of parliament in so far as applicable to local elections, the resulting text is perhaps less clear than intended. In any event, it does appear desirable to strengthen the position of the Commission in this regard, and in order to ensure consistency of election administration standards, **consideration should be given to having the law provide in more express terms for the State Election Commission, as defined in the Draft Law on State Election Commission, to play a supervisory, advisory and co-coordinative role in municipal elections.**

31. The 2006 Joint Recommendations by the Venice Commission and OSCE/ODIHR⁶ recommended that the law outlining the conduct of local level elections be amended to ensure political plurality and balanced ethnic representation on the permanent members of electoral administration bodies. The OSCE/ODIHR and Venice Commission note the inclusion of Article 12.3, which requires that no political party or coalition have more than 50 per cent representation in the permanent composition of a local self-government electoral commission. Additionally, the minimum requirement for party representation on the electoral commission has been lowered from previous laws governing local elections, which required parties or coalitions to submit an electoral list that included at least two thirds of the electoral units to be allowed a proxy on the electoral commission. The Draft Law, which requires parties to run candidates in one third of all electoral units, is less likely to exclude smaller parties, such as those representing national minorities.

32. Article 10.2 of the Draft Law prohibits candidates for councillors from serving on election commissions. However, there are likely other persons, such as judges, members of Parliament, and high state and municipal officials, who should be excluded from membership on an election commission as well. **The OSCE/ODIHR and the Venice Commission recommend that Article 10 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.**

33. As previously suggested by the Venice Commission and the OSCE/ODIHR, the Law should define the grounds, circumstances, and deadlines under which parties and coalitions may appoint or change their extended members on local self-government unit level electoral commissions.

B. TRANSPARENCY

34. The Draft Law includes several safeguards designed to promote transparency and openness in the preparation and conduct of elections, including the following:

- a. Article 32.6 of the Law provides that submitters of candidate lists are permitted to have a representative monitoring the printing, counting, packing, and delivery of the ballot papers.
- b. Under Article 39, a copy of the results at the polling station is required to be publically displayed at the polling station level.
- c. Article 39 further ensures that representatives from the four list nominators with the highest polling results at the station will be given counterparts of the protocol. Representative from all other parties, coalitions, or groups of citizens may receive a certified copy of the protocol from the election commission within 24 hours from the delivery of polling materials to the electoral commission.

35. The Draft Law makes no specific provision for the participation of either international or non-partisan domestic observers during the local elections. Thus, the Law fails to implement the OSCE commitment to provide for election observation.

36. 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 organizations who may wish to do so to observe the course of their

⁶ Idem.

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 proceedings⁷

37. This commitment counsels 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.

38. 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.⁸"

39. The OSCE/ODIHR and the Venice Commission recommend that the law 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.

C. SUFFRAGE

40. The Draft Law extends the right to vote to all citizens who have reached eighteen years of age, are legally competent, and reside within the territory of the electoral unit in which they are voting (Article 3).

41. Article 6.7 requires that electoral units be established so that every electoral unit has "approximately" the same number of voters, while paragraph 8 of the Article allows for electoral units in mountainous areas to have fewer voters to elect a councillor than what is required in other electoral units. **While some deviation in boundary delimitation is expected,⁹ the OSCE/ODIHR and the Venice Commission suggest the Republic of Serbia consider amendment to provisions of this Article to define the meaning of 'approximately' more clearly in this context, and articulate that such deviation should be minimized by all means reasonably possible to ensure equality of suffrage.**

⁷ Document of the Copenhagen Meeting on the Conference of the Human Dimension of the CSE (1990).

⁸ Venice Commission Code of Good Practice in Electoral Matters CDL-AD(2002)023. Explanatory Report II.3.2.

⁹ The Venice Commission suggests that such deviation should in no case exceed 10-15 per cent, Code of Good Practice in Electoral Matters, §I.2.2.iv.

42. The process for the printing and distribution of ballots is determined by Article 32 of the Draft Law. This article requires that, in municipalities where languages of national minorities are in official use, ballots also be printed in the languages of such minority groups. This provision is important for ensuring the suffrage rights of all citizens.

43. Another important provision to protect universal suffrage is the Article allowing for mobile voting, (Article 35.2). However, while the Article requires that the number of persons who have used the mobile ballot box should be recorded in the polling station protocol, it requires further clarification for its proper implementation. Currently, the Article mandates that voters may vote “outside the polling station where he/she is registered” but does not provide guidelines for how such mobile voting will be undertaken or what requirements a voter must meet to be allowed to vote outside their proper polling station. **The Venice Commission and OSCE/ODIHR recommend, as has been previously recommended, that the law be revised to include specific safeguards on the provision of mobile voting. Such amendments should (1) require that 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, and (2) state that all procedures for identifying a voter, issuing and marking a ballot, and for observation are applicable to the mobile voting procedure.**¹⁰

D. VOTER EDUCATION

44. Article 31 of the Draft Law states that “citizens have the right to be informed about the candidates,” and Article 8.1 defines the right of citizens to “be informed via mass media about the election campaign of candidate nominators for councillors, as well as all other events relevant for elections.” However, these are the sole provisions for voter education found in the draft law, and are not adequately informative of the necessary nature of content of this education. **The OSCE/ODIHR and Venice Commission recommend that Article 31 be amended to specify which bodies are responsible to ensure citizens are apprised of the candidates for election. Additionally, specific provisions for voter education which focuses on the technical process of voting could be included in the law.**

45. Previous OSCE/ODIHR election observation mission reports have noted the need for increased voter education focused on the importance of the secrecy and individual nature of voting. **Voter education efforts focused on these issues should be increased, pursuant to applicable revisions in the law.**

E. VOTER LISTS

46. The creation and provision of voter lists for local level elections is governed by the Draft Law on The Unified Register of Voters, particularly Article 24. In accordance with this draft law, the ministry responsible for public administration submits authorized voters registers (lists) to relevant electoral commissions. The electoral commission of the local self-government unit only is tasked with “preparing voting material for each polling board” (including relevant excerpts from the electoral register) in a “timely manner” (Article 32.2).

47. Recommendations and analysis of the said draft law appears earlier in this joint opinion. The provisions discussed in this analysis are relevant to the elections of councillors.

F. CANDIDACY

48. Candidates for councillors must be nominated by registered political parties, coalitions of registered political parties, or groups of citizens. If candidates are nominated by a group of

¹⁰ Venice Commission Code of Good Practice in Election Matters, Explanatory Report, §3.2.2.1.

citizens, then Article 19.2 requires that the candidates be supported by signatures of “not less than 30 per cent of voters in an electoral unit”. This provision is problematic, as thirty percent (30 per cent) is an excessive requirement for signature support and the question may be raised whether a wording of “30 voters per electoral unit” is the correct one, cf. below. In any event commonly accepted maximum is one percent (1 per cent) of the total number of voters in the relevant constituency.¹¹ **The Venice Commission and the OSCE/ODIHR recommend that the “30 per cent” should be reduced to 1 per cent or a figure corresponding to that range.**

49. Article 19.3 requires, in small electoral units, that lists nominated by groups of citizens be supported by only “20 voters per electoral unit in municipalities which have between 20,000 and 30,000 voters”. The mathematical gulf between 20 and 6,000 (30 per cent of 20,000), as well as the restrictive nature of a 30 per cent requirement, suggests there is an error in either the translation or original text of Article 19. **The OSCE/ODIHR and the Venice Commission recommend that the original language text be checked and that it is verified that all paragraphs in Article 19 are consistent, grammatically and mathematically, and that the use of “electoral unit” in Article 19 is not inconsistent with mandate distribution system intended to distribute mandates in two steps - first based on overall candidate list performance in the “local self government unit” and then to individual candidates based on respective individual performance in the “electoral unit” .**

50. Article 25.3 stipulates that signatures of voters supporting a candidate for councillor are to be certified in accordance with “the law governing signature certification”, for which a fee will be charged. It would be preferable that the Draft Law itself 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.** It is 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 lists; it would also avoid the use of arbitrary criteria as a means of excluding a particular list.

51. Lists which are submitted by candidates of registered political parties or coalitions of political parties do not need to be supported by voter signatures, as it is assumed that political parties have already shown a minimum level of citizen support in order to be registered. The fee to be paid for verification of the signatures of voters would only apply to candidates not running on the lists of a party or coalition of parties. In effect, the requirement for the collection of signatures, as well as fees applied with their verification, presents an extra obstacle to the nomination of candidates not affiliated with a political party and the burden there from for an established party is not necessarily a heavy one. This provision of the Law tends to impede the right of candidates not affiliated with a political party to be elected on an equal basis with other candidates. **The OSCE/ODIHR and Venice Commission recommend that the requirements for signature support be applied fairly and equally to all candidates and that exemptions be based on previous electoral success in winning a mandate as opposed to whether the list submitter is a political party and the relief thus afforded to the registered parties would not seem a matter of major importance for them.** The Draft Law on Election of Councillors 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 numbering at least ten voters (Article 20.5) in order to be nominated. Paragraph 7.5 of the 1990 OSCE Copenhagen Document includes

¹¹ One percent (1 per cent) is recognized as a maximum needed for signature support. See Venice Commission Code of Good Practice in Electoral Matters, Explanatory report 1.3 page 25.

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.** Further, Articles 42-44 of the draft law should be amended to account for independent candidates in the allocation of mandates, particularly in regard to the five percent (5 per cent) legal threshold.

52. Further to the above observations regarding Article 19, it is to be noted that the text of the Draft Law in the chapters dealing with candidacy and conduct of elections, as well as the chapter on mandate allocation, appears somewhat lacking in clarity in certain places. Accordingly, and especially in view of the novelty of the electoral system proposed, it is recommended that the text of the Draft Law be carefully examined for clarity and consistency with respect to the ramifications of the system and otherwise.

53. On the substantial level as regards candidacy it may be noted that the Draft Law (as the prior Law) makes no provision for the number of candidates which may be presented on the individual candidate lists. For reasons including equality of opportunity and good order, it is generally desirable to specify a maximum number of candidates on a list in relation to the number of seats/mandates contended for.

G. ALLOCATION OF MANDATES

54. Article 22.2 requires that all electoral lists include no less than 30 per cent of candidates of the sex less represented on the list. If a list does not meet this requirement, then it is deemed deficient and the nominator has 48 hours to rectify this shortcoming (Article 26.2). The application of a gender quota to the candidate lists is notable as a specific measure to facilitate female participation in the electoral process. However, such a quota is overly passive in nature, requiring only that females appear on electoral lists, not that they are represented in local self-government. In line with the previous OSCE/ODIHR recommendations,¹² **the OSCE/ODIHR and the Venice Commission welcome the introduction of gender quotas for the submission of candidate lists and hope that this provision will have also a positive impact on the distribution of mandates so as not to diminish the potential positive effect the quota was intended to achieve.**

55. In accordance with Article 5 of the Draft Law, “national minorities shall be proportionally represented in assemblies of local self-government units.” Further, Article 42.3 creates an exception to the five percent (5 per cent) legal threshold for mandate distribution for “lists of national minorities”. It follows that political parties and coalitions representing national minorities will participate in mandate distribution even if they receive less than five percent (5 per cent) of the votes. However, the law does not include a substantive definition of “list of national minority”, i.e. a definition serving to determine which political parties, coalitions, and groups of citizens under the five percent (5 per cent) threshold are entitled to participate in the distribution of mandates. The provisions of Article 21.2-21.4 approach the matter in a formal way, implying as they do that such determination will have to be made by “the body competent for keeping registers of political parties”, as this body “corroborates by a certificate” “the position of a political party of a national minority”, presumably on the basis of materials having been filed by those concerned for purposes of entry upon the register. Unless the matter is clearly dealt with in other legislation in a democratic way, it would be beneficial if the law provided guidance for assessing what the “position” of the political party means. **The OSCE/ODIHR and the Venice Commission recommend that the Draft Law be amended to include such a definition. While an enhanced clarification of these**

¹² OSCE/ODIHR Limited Election Observation Mission Final Report, Early Parliamentary Elections 11 May 2008, §XIII.A.3.

Articles should be considered, it is to be noted that this Draft Law still constitutes a substantial improvement regarding the participation of national minorities in local elections.

56. In the previous law governing local elections, political parties were allowed to arbitrarily distribute two-thirds of the mandates to candidates without regard to their order on the lists. The Venice Commission and the OSCE/ODIHR had previously recommended that this system be amended. In addition, previously the mandate of an elected councillor terminated if she/he ceased to be a member of the political party or coalition on whose candidate list she/he was elected, or such a party/coalition no longer existed. These provisions raised obvious problems. Once elected, deputies should be accountable primarily to the voters who elected them, not to political parties. This flows from the fact that they hold a mandate from the people, not from a political party. The fact that a deputy has resigned from or has been expelled from the party should therefore not have entailed their expulsion from office. Such a provision was contrary to Paragraph 7.9 of the 1990 OSCE Copenhagen and the OSCE/ODIHR and the Venice Commission had previously urged its amendment. **The OSCE/ODIHR and the Venice Commission are pleased to note that neither provision is found in the current Draft Law on Election of Councillors.**

57. The Draft Law does in fact proclaim a clear departure from this previous system, by introducing an election framework based on a certain combination of elements from the traditional proportional and majoritarian election system. The local self-government unit (municipality) will form a single constituency for the parties or groups competing in the election by electoral lists, in the sense that the performance of their listed candidates in the global community will govern the allocation of mandates or council seats between the respective groups or list nominators, calculated according to the proportionate share won by all candidates on their list out of the total of votes cast in the community (using d'Hondt's rule). At the same time, the municipality is divided into "electoral units", equal in number to the number of councillors to be elected, and having approximately the same number of registered voters within their area. The candidates advanced by the list nominators are to be presented by reference to the electoral units, with one person entitled to be a candidate on one electoral list and in one electoral unit only (Art. 20). The voting in the election will proceed by the electoral units, with each voter voting for one candidate only. The allocation of the mandates won by each group list among its candidates will then be made on the basis of their individual performance in the respective electoral unit.

58. More specifically, under the proposed system of mandate distribution, the process will be that the voters in each electoral unit vote for a *single candidate* chosen from one of the electoral lists on the ballot (Article 36), whether submitted by a political party, coalition, or nominating group of citizens. Mandates for nominators are allocated based on *the sum total of votes won by all candidates on a nominator's electoral list from each electoral unit in the local self-government unit* (Arts. 42 and 43). All electoral lists whose total votes exceed five percent (5 per cent) of the total votes from the local-self government unit (as well as parties of national minorities who do not reach this 5 per cent threshold but reach the mathematical threshold), are awarded mandates proportional to their total number of votes won in the local self-government unit (Arts. 42, 43). Within each electoral list which has won mandates, such mandates are distributed "to the candidates from that list in accordance with the percentage of votes the candidates have won relative to the total number of voters registered in the electoral units they were nominated at" (Art. 44.1).

59. This hybrid distribution system represents an example of so-called matrix apportionments, and appears to constitute an interesting election arrangement. It represents at the same time a form of preference voting, in the sense that it favours a geographical distribution of the mandates contended for and serves to enable the voters to cast their ballot on the basis of personalized choice among candidates. It also has the advantage of eliminating the possibility of allocating mandates of electoral lists on a basis other than the

immediate results of the vote. The system is not unique, in that similar systems are known in several countries and applied there to greater or lesser extent and purposes (e.g. in the Nordic countries, such as Denmark and Norway), in national and/or municipal elections.

60. Besides its substantial advantages, however, such distribution system, being based on voter registration in the respective electoral unit, but linked to overall vote totals in the local self-government unit, can result in various anomalies, depending both on voter turnout and the vote margin between the two candidates who receive the most votes in an electoral unit. Take, for example, a situation in which Party A receives two mandates, while Party B receives one mandate in the local self-government unit. Party B's "winning" candidate under Article 44.3 is a candidate who has received 13 per cent of the votes of the registered voters in Electoral Unit Number Ten, while Party A has a candidate who has received 22 per cent of votes of the registered voters in that same electoral unit (No. Ten). However, in other electoral units in the local self-government unit, Party A's two "winning" candidates are candidates who have received 29 per cent and 27 per cent of the votes of registered voters in their electoral units respectively. Therefore, Party A's two mandates are given to these two candidates, and Party B's candidate (13 per cent), who has significantly less support in Electoral Unit Number 10 than Party B's candidate (22 per cent), wins the mandate in Electoral Unit Number 10. Other anomalous results can be expected where there are large differences in voter turnout among the respective electoral units. Consequently, there can be a situation where an elected councillor may not be truly representative of the will of the electors within the electoral unit. On the other hand, the end result may be fair in the sense that a mandate will in fact be received by the electoral unit (even if through another list), assuming that a principle of one mandate per unit does apply. In this connection it is to be noted that the said principle of one mandate per electoral unit resulting from the overall election is not expressly or directly stated in the Draft Law, so that a question may be raised whether it is intended to persist (as would seem the preferable and more logical solution). A further point to be observed is that Article 44.2 appears ambiguous in that it states that a mandate will be awarded to "the candidate from the list who has won the largest number of votes in an electoral unit" compared with all candidates on a particular electoral list. However, this is in contradiction to Article 44.1, which requires that mandates be allocated not based on total votes won, but on the percentage of votes won when compared with the number of registered voters within the electoral unit. From the context (e.g. the next Art. 44.3), it would seem that Article 44.1 is intended to be controlling, but this is hard to determine with certainty. Further, the ambiguity serves as a reminder that the choice between reliance on the quantum of votes cast and on the number of registered voters in the electoral unit involves a problem of substance, seeing that the effect from the one or the other will not be identical, and that the difference may affect the results of the mandate distribution in the elections, as mentioned in the preceding paragraph. Accordingly, **the Venice Commission and the OSCE/ODIHR recommend that the original language text of the Draft Law should be reviewed in order to reconcile the apparent contradictions within Article 44 and clarify the further ambiguities mentioned, and also to give serious consideration to the issues of substance involved in choosing the optimum method of mandate allocation, including clarifying and improving or replacing the proposed mandate allocation system.**

61. Returning to the fundamental aspects of the electoral system proposed in the Draft Law, resting on a subdivision of the local self-governing units into electoral units and having the allocation of resulting mandates on the municipal council dependent both on the sum of votes obtained by all candidates of the respective parties or nominators in the global self-governing unit and on the votes or vote percentages gained by the candidates within each election unit, it may be said again that this hybrid mandate distribution system is interesting and has substantial advantages, beside the advantage of effecting system change in the direction of increased respect for the will of the electors, which is a universal tenant of genuine elections 12. At the same time, the built – in need to respect two sets of constraints

carries with it the risk of producing individual results which may be seen as anomalous from a specific points of view, including results tending to go against the will of the voters in a given electoral unit. An optimization of the system towards a fair distribution of mandates accordingly calls for an effort to minimise this risk. **The OSCE/ODHIR and the Venice Commission recommend that the merits and demerits of the electoral system and the applicable provisions of the Draft Law be subjected to serious scrutiny and evaluation with a view to such optimization, without necessarily excluding consideration of another system designed for serving similar aims of fairness and voter respect.**

62. The legal threshold for participating in the allocation of mandates in local elections has been increased from three percent (3 per cent) to five percent (5 per cent) in the Draft Law on Election of Councillors, as compared to previous laws governing local elections.¹³ Although five percent (5 per cent) is not contrary to any international or European standard, it is not clear why the legal threshold has been raised. This change could adversely affect smaller political parties and lists submitted by groups of citizens.

H. CAMPAIGN FINANCE

63. Regulations regarding campaign finance do not appear in the Draft Law. Campaign finance procedures are regulated by other legislation. It is assumed that campaign finance for local elections is regulated by the 2004 Law on Financing of Political Parties. The 2006 Joint Recommendations noted the 2004 Law on Financing of Political Parties sets limits on political party expenditures and limits individual contributions made to political parties. The 2006 Joint Recommendations noted that in the 2004 elections there were significant questions regarding problems with the implementation of the 2004 law. This joint opinion assumes that campaign finance provisions are fully covered by the Law on Political Party Financing and urges **the Republic of Serbia to address issues of implementation and ensure provisions in the law are adequately fulfilled.**

I. MEDIA

64. Article 57 of the Draft Law incorporates the provision of the parliamentary election law concerning “public information on candidates”. The provisions in the parliamentary election law dealing with access to the media are rather brief and leave too much of substance to be dealt with in subordinate acts. Although Article 8.2 of the Draft 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.¹⁴

65. The OSCE/ODIHR and Venice Commission recommend that additional provisions regarding media conduct during local elections be included, or that the law be amended to clearly state the status, applicability, and level of implementation of other laws governing the media environment during the electoral period.

J. VOTING AND COUNTING

66. Article 23 of the Draft Law requires that the electoral commission of the local self-government unit is responsible for maintaining the voter list to issue “certificates of electoral right”. It would appear that these are required by those seeking inclusion on a candidate list (Article 24.3.1) but not by voters on polling day. **The OSCE/ODIHR and the Venice Commission recommend that the law be amended to clearly state the purposes, when**

¹³ Joint Recommendations on the Laws of Parliamentary, Presidential and Local Elections, and Electoral Administration in the Republic of Serbia; Venice Commission and OSCE/ODIHR; CDL-AD(2006)013; §V.B.81.

¹⁴ See, e.g., Venice Commission Code of Good Practice in Electoral Matters CDL-AD(2002)023; §I.2.3.

needed, and procedures for issuing, obtaining, and surrendering to election administration authorities a “certificate of electoral right”.

67. The Draft Law makes specific and positive provisions for the determination of voter intent (Arts. 36.2, 37.7). Such articles are important to ensure the effective practice of suffrage rights. Their inclusion here is positive.

68. In previous electoral laws, articles appeared which required the disbanding of the polling boards and the holding of *repeat voting* for relatively insignificant infringements of the law. This included such instances as where a member of a polling board failed to re-explain the voting procedure when requested or where there has been campaigning within 50 meters of the polling station. Positively, provisions for dissolution of polling boards for such reasons, which were overly extreme in nature, do not appear in the current law.

69. However, the Draft Law still contains provision for the dissolution of a polling station and a re-vote in the case that number of ballot papers contained in the ballot box is later found to be greater than the number of persons who voted or that the control ballot is not found in the box. The requirement for repeat voting if the appropriate 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 these irregularities. **The OSCE/ODIHR and the Venice Commission recommend that Article 37.8 of the Draft 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.**

70. The Draft Law does not provide specific guidance as to how a voter's eligibility is determined at the polling station level. **The OSCE/ODIHR and the Venice Commission recommend that the law do list the forms of identification which are sufficient to establish a voter's identity.**

K. PROTECTION OF SUFFRAGE RIGHTS

71. Article 50 of the Draft Law provides that electoral complaints can be lodged by every voter, candidate for a councillor, or nominator of an electoral list. Complaints are submitted to the electoral commission of the local-self government unit within 24 hours of the alleged violation or decision by the electoral commission, which will decide based on majority vote (Art. 11.3) within 48 hours of receipt (Art. 52). This deadline for submitting a complaint to the electoral commission is extremely short, raising the concern that, should the complainant not receive notification of the initial decision or action in a timely manner, it may be too late to appeal. **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.**¹⁵

72. An appeal can be filed to the Administrative Court against the decision of the electoral commission of the local self-government unit within 24 hours of the delivery of the decision. However, the law does not expressly require that a copy of the electoral commission's decision be provided immediately to every person who is affected by the decision. In line with their previous recommendations, **the OSCE/ODIHR and the Venice Commission recommend that the Draft Law be amended to require that a copy of the electoral commission's decision must be immediately delivered to every person affected by the decision. The relatively short timeframe for lodging complaints to the Administrative Court raises the concern that, should the complainant not receive notification of the**

¹⁵ See, *e.g.*, Venice Commission Code of Good Conduct in Electoral Matters, CDL-AD(2002)023; §II.3.3.

decision in a timely manner, it may be too late to file an appeal. The OSCE/ODIHR and the Venice Commission recommend that consideration be given to extending the deadline of 24 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.

73. The Draft Law does not contain any express guarantees of a fair, public, and transparent hearing at any stage of this process. This is contrary to best practices for electoral dispute resolution and OSCE commitments.¹⁶ Proceedings on cases before the Administrative 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, as was recommended in their 2006 Joint Recommendations, that the law be amended to provide the minimum procedural guarantees for these cases, including the right to evidence in support of a complaint after it is filed, the right to a fair, public, and transparent hearing on the complaint, and the right to receive a written decisions that explains the legal basis as well as the factual support for the decision.**

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

75. The OSCE/ODIHR EOM report on the 2002 partial municipal elections highlighted a problem due to the failure of the law to prevent judges from serving both on an election commission and in a municipal court. Concern over this issue was also articulated by the Venice Commission and OSCE/ODIHR in their 2006 Joint Recommendations, which recommended amendments to the law to require the assignment of a different judge in cases which present a conflict of interest. It is not acceptable for judges tasked with the resolution of electoral disputes to also serve in an administrative role within an electoral commission. The rationale for this prohibition is clear. As noted in the said Recommendation, a judge should not sit in review of a decision in which the judge participated as a commission member, and in broader terms, the advantages which may be gained by having members of the judiciary serve as custodians of the election process must always be measured against the overriding principles of judicial independence and impartiality. **While it is noted that the fundamental issue here involved is not expressly addressed in the Draft Law, it is emphatically assumed that the appropriate safeguards for precluding the risk of a conflict situation of this kind are appropriately provided for in other legislation of the Republic.**¹⁷ As a final matter under this head, it is interesting to note that in the Draft Law, it is foreseen (as reflected in the preceding paragraphs) that the immediate jurisdiction for appeals in respect of electoral disputes involving protection of suffrage rights (and also the protection of mandates of elected councillors, cf. Art. 49) will be vested in the Administrative Court expected to be established in the Republic of Serbia, in lieu of the general courts of first instance. It appears that this proposal may be regarded as a positive step.

¹⁶ See, e.g., Code of Good Practice in Electoral Matters: Part II, 3.3.4; Document of the Copenhagen Meeting on the Conference of the Human Dimension of the CSE (1990) §5.16.

¹⁷ See also Council of Europe Committee of Ministers Recommendation No. R (94)12 (on independence, efficiency, and role of judges).