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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

AND

OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS

(OSCE/ODIHR)

JOINT OPINION

ON

THE DRAFT LAW

**ON AMENDMENTS TO THE LAW ON ELECTION OF COUNCILLORS
AND MEMBERS OF PARLIAMENT**

OF MONTENEGRO

Endorsed by the Council for Democratic Elections

at its 37th meeting

(Venice, 16 June 2011)

and by the Venice Commission

at its 87th plenary session

(Venice, 17-18 June 2011)

on the basis of comments by

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I. Introduction

1. At the request of the President of the Parliament of Montenegro, the Venice Commission and the Organization for Security and Cooperation in Europe – Office for Democratic Institutions and Human Rights (OSCE/ODIHR) have assessed the Draft Law (CDL-REF(2011)021) on Amendments to the Law on Election of Councillors and Members of Parliament of Montenegro (CDL-EL(2010)010), prepared by a multi-party working group. This request was submitted on 9 May 2011.

2. The Law on the Election of Councillors and Representatives was initially adopted in 1998 and has since been amended several times, most recently in 2006. The law, hereinafter referred to as “the Election Law”, regulates the conduct of parliamentary and local council elections in Montenegro. It has to be harmonised with the 2007 Constitution of Montenegro by 31 May 2011, in particular the articles concerning the “authentic representation” of minorities (Article 79 para. 9 of the Constitution).

3. A previous draft (CDL-EL(2010)011) had been submitted to the Venice Commission and OSCE/ODIHR in March 2010. This led to the adoption of the joint opinion on the Draft Law on Amendments and Supplements to the Law on the Election of Councillors and Members of Parliament of Montenegro (CDL-AD(2010)023) at the 83rd Plenary Session of the Venice Commission (Venice, 4-5 June 2010).

4. The issues already addressed in the 2010 opinion which have remained unchanged will not be examined in detail in the present opinion. Reference should therefore be made to the 2010 opinion, in particular concerning the documents taken into consideration.¹

5. The present Opinion was endorsed by the Council for Democratic Elections at its 37th meeting (Venice, 16 June 2011) and by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011).

II. Provisions regarding participation of national minorities

6. Article 79 paragraph 9 of the Constitution of Montenegro adopted in 2007 sets forth the right of minority nations and other minority national communities to “authentic representation in the Parliament of the Republic of Montenegro and in the assemblies of the local self-government units in which they represent a significant share in the population, according to the principle of affirmative action”. One of the aims of the draft law under consideration is to realise this constitutional goal, which has so far been reserved to the Albanian minority only.

7. The draft law under consideration maintains the system of “authentic” representation of minorities which had been proposed under the draft law of 2010. This system is based on the following principles:

- affirmative action is extended to all minority groups (not only the Albanian minority as previously);
- groups of citizens may submit lists of candidates (not only political parties and coalitions);
- two different kinds of measures of affirmative action are foreseen for larger minority groups and for the smaller group (the Croatian minority);
- the declaration of belonging to a minority group is purely voluntary;

¹ See CLD-AD(2010)023, para. 7.

- each national minority is eligible to benefit from the affirmative measures provided in the law and the limitation in a previous draft that excluded a national minority constituting more than 1/6 of the population has been removed;²
- the votes expressed in favour of a particular minority are not lost if the number of votes received by the minority reaches the minimum requirement of 0.7 per cent of the valid votes (0,4 per cent for the Croatian minority);
- there are no reserved seats and in order to obtain a seat it is necessary to have received a minimum number of votes; in certain conditions, however, the smallest minority (the Croatian minority) is guaranteed a seat, provided that a candidates list of this minority reaches a minimum threshold of votes.

8. In the opinion on the previous version of the draft law, the Venice Commission and the OSCE/ODIHR expressed a generally positive assessment of this system.³

9. The revised draft law under consideration maintains in substance the same characteristics and, therefore, positive assessment of the 2010 opinion still pertains.

10. The analysis of the features of the system which have been maintained will not be repeated in this opinion and reference is made to the previous one.⁴ Certain changes have nonetheless been introduced and they will be examined in detail hereinafter.

11. In the previous version of the draft law, a specific preferential treatment was reserved to “a minority national community participating in the total population to 2%”; in the current version of the draft law, this quantitative criterion has been substituted for “the minority national community of Croats”. It is true that, according to the last census (2003), only the Croats had reached a percentage lower than 2 per cent (i.e. 1 per cent), so that they appear to be the only beneficiary of the specific preferential treatment. However, Venice Commission and OSCE/ODIHR are of the opinion that it would be preferable to maintain an objective, quantitative criterion in order not to stigmatise one specific group and, more importantly, not to create a possible basis for discrimination in the Constitution, should, in future censuses, the Croats reach a higher percentage or other minority groups reach lower percentages. Should the quantitative criterion be preferred, a reference to the census should also be added, as previously recommended.⁵

12. Article 30 of the draft law maintains the preferential measure for minority candidates lists that the number of candidates must not be lower than one third (instead of two thirds) of the number of seats to be allocated. This measure is a positive development.

13. As to the documents which need to be submitted to the electoral commission together with the candidate lists, Article 34 of the draft law requires, in addition to the “statement of the submitter of the list of candidates stating that they are taking stand in elections for authentic representation of a minority nation or other minority national community” (which had already been added in the previously examined version of this draft law), an “extract from the constitutive and programme act”. This additional requirement does not relate only to candidates lists representing minority interest, but to all candidates lists. The terms “constitutive and programme act” seem to refer to formal acts which are required for political parties or formal associations. If the understanding of the terms is correct, under the new law, groups of citizens

² An upper limit of “a share in the population of the electoral district of 1/6” had been inserted by the Working group in previous versions of this draft law but has not been maintained in the final version. This is indeed preferable as it seems more in line with the Constitution of Montenegro which does not set any conditions for access to affirmative action.

³ CDL-AD(2010)023, para. 53.

⁴ CDL-AD(2010)023, paras. 18-29.

⁵ CDL-AD(2010)023, para. 24.

will also be allowed to submit lists and they will not normally have a “constitutive and programme act”. This requirement should therefore be limited to political parties and formal associations.

14. The new draft law maintains the exceptional rule of participation in the allocation of mandates for minority candidates lists, but clarifies it to a significant degree (in line with the previous recommendations of the Venice Commission and the OSCE/ODIHR).

15. The system is as follows. If none of the lists of candidates of the same specific minority or minority national community reaches the general threshold of 3 per cent, but some of the lists individually gain no less than 0,7 per cent of the valid votes, the latter lists take part in the allocation of the seats *corresponding to a maximum of 3 per cent of the total number of valid votes*. It must be understood that this upper limit applies irrespectively of the actual sum of the votes individually obtained by the participating lists. Even if the total is of, say, 6 per cent, the “aggregated” list will only participate in the allocation corresponding to the 3 per cent upper limit. It would however be suitable to make the text of the law clearer on this point.

16. It is clearly stated that this right shall be exercised by candidate lists representing a specific (the same) minority nation or a specific (the same) minority national community “as specified in the election application, title of the list of candidates or constitutive act of the submitter of the list of candidates”. This is a welcome clarification which had been specifically suggested by the Venice Commission and the OSCE/ODIHR.⁶

17. It is also explicitly foreseen (future Article 94 para. 3) that the participation of a candidate list of a specific minority nation or minority national community in the pre-election coalition with candidate lists of political parties or civic groups not representing minority rights specifically shall not prevent other submitters of candidate lists of that minority nation or minority national community from benefitting from the exceptional rule of paragraph 2 of Article 94. This is a positive development.

18. Finally, the method of allocation of the seats corresponding to 3 per cent of the valid lists within the “aggregated” lists is added in Article 95. This is a welcome addition, which had been specifically recommended by the Venice Commission and the OSCE/ODIHR.⁷ Pursuant to this new provision, the seats will be allocated through the d’Hondt method, which is a recognized method for mandate allocation.

III. The Electoral Process

A. Electoral System

19. On a positive note, Article 66 of the draft law, like the draft submitted for opinion in 2010, makes changes to the electoral system. Previously, according to Article 96 of the Election Law, half of the seats won by an electoral list were awarded based on the order of candidates while the other half was awarded at the discretion of list submitters. The alteration proposed in the draft Law, which ensures all seats won by an electoral list are awarded on the basis of order, is a welcome one. The same is true for Articles 67 and 68 of the draft law concerning the filling of vacant seats.

20. Article 38 of the Election Law provides an avenue for registered political parties to join together in a coalition for the purposes of submitting a joint electoral list. *The Venice Commission and OSCE/ODIHR recommend adopting more detailed provisions on the issue of*

⁶ CDL-AD(2010)023, para. 27.

⁷ CDL-AD(2010)023, para. 29.

*coalitions and in particular on their dissolution and its effects, in conformity with their previous opinion.*⁸

21. Article 31 of the draft law provides that, for the purpose of exercising the gender equality principle, there shall be no less than 20 per cent of candidates of the less represented gender on the candidate list. This is a positive measure. However, in order to be effective, this provision should require that candidates of each gender be ranked high enough on the list to have a realistic opportunity for being allocated a mandate. For example, the law could stipulate that every fifth candidate on the list of candidates should be of different gender.

B. Right to vote

22. Like the draft submitted for opinion in 2010, the draft law under consideration amends Article 2 of the Law in force by providing that “citizens” (*državljeni*) as opposed to “inhabitants” (*gradjani*) are entitled to vote if they are on the voters list. Further, the draft law replaces the term “inhabitant” throughout the law with the term “voter” in the sense of “citizen” (Article 5). As underlined in the previous opinion, such a change brings the electoral law in conformity with Article 45 of the Constitution and is welcome.⁹

23. Article 69 of the draft law allows persons without data on citizenship or with the citizenship of any of the republics of the former Socialist Federal Republic of Yugoslavia (SFRY) to remain on the electoral roll until they provide the necessary evidence of Montenegrin citizenship. The deadline to be stated in this provision should be reasonable, as enabling non-citizens to remain on the electoral lists beyond a reasonable time could undermine the legality of the elections from a constitutional point of view.

24. The Election Law provides that a Montenegrin citizen should be a permanent resident of Montenegro (a) for at least twenty four months prior to the polling day in order to have the right to elect and be elected as a representative (this is also provided for by Article 45 of the Constitution), and (b) for at least 12 months prior to the polling day to have the right to elect and be elected as a councillor.

25. Article 8 of the draft law continues to provide for the requirement of 24-month residence in Montenegro to become a voter in parliamentary and local elections. This provision was assessed negatively in the previous Joint Opinion. The OSCE/ODIHR and the Venice Commission confirm that, although a minimum length of residency requirement is considered acceptable for local or regional elections, the length of 24-month residence for national elections could not be considered as a reasonable restriction.¹⁰ Thus, the issue of unreasonable length of the residency requirement remains unaddressed. *It is recommended that the length of residency requirement in national elections is removed from the Constitution and the Law.*

26. On a more positive note, the current draft responds positively to the previous recommendation by shortening the length of residence requirement within a municipality for local elections from one year to six months.

⁸ CDL-AD(2010)023, para. 31.

⁹ CDL-AD(2010)023, para. 33.

¹⁰ According to the Venice Commission “Code of Good Practice in Electoral Matters” CDL-AD(2002)023rev, I.1.1 c.iii and iv, a length of residence requirement may be imposed on nationals solely for local or regional elections; and the requisite period of residence should not exceed six months except in order to protect national minorities.

C. Secrecy of the vote and exit polls

27. The issue of exit polls has been addressed by the draft law. Exit polls may now be conducted after the voting is completed (Article 2 para. 3).

D. Election material

28. The draft law does not address an existing concern regarding the ability for submitters of electoral lists to inspect all election materials, including ballots, polling station minutes, and the voters' list. Article 77 of the Election Law could potentially compromise citizens' privacy and possibly even compromise the secrecy of the vote in small communities. Arguably, such a provision may also run counter to the constitutional protection of personal data.¹¹

E. Election Administration

29. Previous OSCE/ODIHR election observation mission reports have highlighted concerns over the failure of the Election Law to guarantee political pluralism on the permanent membership of election commissions. The draft law seems to provide an adequate reply to these concerns, which is to be commended.

30. According to the new appointment process (Article 21 of the draft law), the State Election Commission includes a chairperson, a secretary and nine members in the standing composition and one authorised representative of each submitter of candidate lists. The nominee of the political party which won the highest number of MP seats at previous elections shall be appointed the chairperson of the State Election Commission; the nominee of the political party which won the second highest number of MP seats at previous elections shall be appointed the secretary of the State Election Commission; one representative of each of the four opposition political parties in parliament must be appointed members of the standing composition of the State Election Commission.

31. This amendment should be considered positive as it clarifies the system of appointments of members of the State Election Commission. The attempt to include significant representation of the opposition parties is also welcome. However, consideration should be given to address a situation when there are more or fewer than four opposition parties represented in parliament. The composition of election commissions should not be submitted to a new parliamentary debate each time a party enters (or loses its seats) in parliament, or joins the majority or the opposition.

32. Article 16 of the draft amendments stipulates that the permanent members of municipal election commissions shall be appointed by municipal assemblies from among candidates proposed by political parties that have councillors in the respective assembly. It is recommended that the law extends the possibility of nominating candidates to the permanent composition of the municipal election commissions to the councillors elected on the lists supported by the groups of voters.

33. Article 17 of the draft law provides that a municipal election commission includes a chairperson, a secretary, five other members, and one representative of each submitter of candidate lists. The chairperson of the municipal election commission will be the nominee of the political party which won the highest number of seats or votes at previous elections; the secretary will be the candidate of the political party which obtained the second highest number of seats or votes; two other members will be appointed from the two opposition political parties with the highest number of seats, or the highest number of votes in case of the same number of

¹¹ See Article 43 of the Constitution of Montenegro.

seats. In order to clarify the text, the expression “the highest number of seats, or the highest number of votes in case of the same number of seats”, should be used in the whole provision.

34. The same article also stipulates that one representative of each of the two opposition political parties in the relevant assembly with the highest number of seats, or the highest number of votes in case of the same number of seats won at previous elections, should also be appointed as members of the permanent composition of a municipal election commission. Presumably, this amendment is intended to ensure plurality of political representation in municipal election commissions. However, it is *recommended* that the law addresses the situations where there is only one party in the opposition or there is no opposition party in a municipal assembly.

35. Article 18 of the draft amendments extends the period for authorised representatives of submitters of electoral lists join municipal election commission from 15 to 20 days before election days. This is a positive amendment which will allow “extended representatives” to participate in the work of election administration when important decisions could be made.

36. The polling boards shall be composed of the chairperson and four members in the standing composition and one authorised representative of each submitter of candidate lists. Each political party represented in the relevant parliament shall be entitled to the number of chairpersons of polling boards commensurate with proportional representation of councillor seats in parliament, while polling stations where an individual political party would propose the candidate for chairperson of the polling board shall be determined by the municipal election commission by drawing lots. Two members of the standing composition of the polling board shall be appointed based on the proposal of the political party or coalition with a majority in the relevant municipal parliament (Article 26 of the draft law).

37. The OSCE/ODIHR and the Venice Commission recommend that there should be a proportional representation for national minorities on municipal election commissions and polling boards in areas where they are present.¹²

38. In line with the previous OSCE/ODIHR recommendations, the draft law provides for the establishment of a secretariat of the State Election Commission to assist in the administration of the elections. This is a positive development. However, the OSCE/ODIHR and the Venice Commission emphasise previous recommendations in this area:

- It is recommended that the mandate of the State Election Commission be expanded to guarantee that it co-ordinates and supervises municipal as well as national elections. In particular, its mandate should foresee the adoption of binding regulations necessary for clarifying the implementation of legal provisions and for promoting a uniform administration of elections at all levels in all types of elections.
- It is recommended that the Election Law be amended to ensure that the terms of office of permanent municipal election commission members are respected without early termination caused by political shifts in municipal assemblies.
- It is recommended that the Election Law be amended to require that government and municipal authorities provide the State Election Commission and municipal election commissions with meeting space that is adequate and suitable for accommodating all members, as well as representatives of accredited observer groups.
- It is recommended that the Election Law be amended to require that the State Election Commission and municipal election commissions provide adequate

¹² See Code of good practice in electoral matters (CDL-AD(2002)023rev), II.3.1.iv.

and timely notice of all meetings to representatives of accredited domestic observer groups.

39. In response to previous recommendations, the draft law extends Article 27(4) of the Election Law to ensure that the municipal election commissions provide for and organise training for all polling board members. This is a welcome amendment.

F. Media provisions

40. Equality of opportunity and neutrality of the state in regard of coverage by media are essential features of elections held in conformity with international standards.¹³ At the same time, the regulations on media coverage should not infringe on the principles of freedom of the media.

41. The draft law includes a number of new provisions on media, aimed at ensuring equality of opportunity (Articles 38ff of the draft). These provisions are much more detailed than the present legislation and have obtained broad consensus. In particular, it is made clear that that the submitters of lists of candidates shall be entitled to inform citizens about their candidates, programmes and activities through the national public broadcasting agency, as well as through regional and local public broadcasting agencies, in the same daily timing and/or rubrics, on daily basis, in equal duration and free of charge. Moreover, commercial agencies are obliged to enable paid broadcasting to submitters of verified lists of candidates under equal conditions. Equality also applies to the presentation of announcement of promotional gatherings (Article 43). Television of Montenegro and Radio of Montenegro shall be obliged to organise weekly confrontation of submitters of lists and candidates during the election campaign (Article 47).

42. Article 40 provides for equality of campaign coverage in the newscast in conformity with international standards.¹⁴ At any rate, journalists should enjoy editorial freedom in news reporting and it is therefore recommended that the notion of equality of coverage be understood not only as strict equality of time allocated to various parties in newscast but also as not offering preferential treatment to any parties and candidates.

43. Article 41 stipulates that state and local self-government officials are not allowed to use their presentations in the media for advertising or indirect advertising of the candidate lists and/or their election programmes. This is positive amendment which has a potential to reduce possible abuse of media coverage by public officials during election campaigns.

44. "During the election campaign period, media may not present comments or texts that would imply party affiliation or have party propaganda nature when reporting on the current events and work of state authorities and officials" (Article 51.a para. 4 as amended by Article 41). This provision should be understood as applying only to broadcast, commercial and non-profit media mentioned in Article 51.a para. 3, and not to other media, in particular partisan press.

45. Article 44 stipulates *inter alia* that during election campaign period, the Radio and Television of Montenegro shall be obliged to provide each submitter of verified candidate list with free, equal and daily broadcasting, including: (1) not less than 200 seconds per day of campaign advertisement, and (2) "three-minute coverage of the promotional gathering, twice a day, at the time immediately after the central evening informative TV and Radio shows".

¹³ Code of good practice in electoral matters (CDL-AD(2002)023rev), I.2.3; see also I.3.1.a on freedom of voters to form an opinion. See also Recommendation (2007)15 of the Committee of Ministers to member states on measures concerning media coverage of election campaigns.

¹⁴ Cf. Recommendation (2007)15 of the Committee of Ministers to member states on measures concerning media coverage of election campaigns, II.2.

46. While the implementation of these requirements may be possible in the parliamentary elections, it may not be always possible in local elections due to potentially high number of candidate lists in various municipalities. Consideration should therefore be given to address potential challenges of application of the whole article 44 of the draft amendments in local elections.

47. Article 47 introduces the requirement of broadcasting candidate debates in public radio and television, and it is commendable. However, the requirement of editors and hosts of the shows to determine the lists of questions should be interpreted as applying to the list of topics and not to the list of questions to be asked, in conformity with the principle of the freedom of media.

48. Article 51 introduces the requirement for broadcast media to publish their official rules of coverage of election campaign. However, it is not clear which article of the current Election Law is amended by Article 51.

49. Article 52 establishes a Board for monitoring the application of the Law on Election of Councillors and Members of Parliament in the part related to media. This is a welcome development.

G. Voting Procedures

50. The draft law (Article 61) amends Article 85 of the Election Law related to mobile voting. Now two members of the polling board have to administer mobile voting, and the law requires that they cannot be from the same party or coalition. This amendment follows a recommendation by the Venice Commission and OSCE/ODIHR. The issue of how ballot coupons are to be detached and handled during mobile voting has not been addressed.¹⁵

51. Prior OSCE/ODIHR election observation mission final reports have identified problems with prison voting, which is governed by Article 87 of the Election Law. It has been noted that the procedures in place for prison voting did not always provide for sufficient secrecy of the ballot, particularly when the number of voters in the polling station was small. *It is recommended that consideration be given to amendments aimed at ensuring adequate safeguards for the secrecy of the ballot for those voting in prisons.*

H. Counting/Tabulation of Votes

52. The OSCE/ODIHR noted in the 2009 elections that the SEC had made available the results broken down by the polling station on its website. This is a positive practice which is now confirmed by Article 23 para. 3 of the draft law. Also on a positive note, Article 19 para. 2 provides for the publication of interim and final voting results of every polling station on the website of each municipal election commission.

I. Repeat Elections

53. Under Articles 81, 83, and 89 of the Election Law, the polling board is dissolved, a new one appointed, and voting at the polling station is repeated if there are certain legal violations. These provisions have been previously questioned as no margin of appreciation has been left to the election administration where a violation may not have affected the voting results. The draft law has made changes to Article 81 of the Election Law to allow that the polling board may be dissolved and voting repeated, rather than requiring such dissolution. This is a positive development. In addition, it is recommended that similar consideration be given to amending

¹⁵ CDL-AD(2010)023, para. 45-46.

Articles 83 and 89 so that repeat polling is required in case of gross violation of the law only where the discrepancy could have affected the allocation of mandates.

IV. Conclusions

54. Overall, the amendments introduced by the draft law are positive, representing improvements to both the technical nature of voting and the protection of basic fundamental rights, like that of non-discrimination. A number of issues raised in previous Venice Commission and OSCE/ODIHR opinion have been addressed in a positive way.

55. Regarding the authentic representation of minorities, the use of a general model for all minority nations or other minority national communities without reserved seats is introduced by the draft law, with a lower quorum requirement which partially takes into account the actual population of minorities. This model is original and balanced, is in conformity with the Constitution and applicable international standards, and therefore deserves a positive assessment.

56. In conclusion, the draft law under consideration takes into account several previous Venice Commission and OSCE/ODIHR recommendations and generally represents a positive development. Some further amendments would however be recommended, as expressed in previous chapters. The Venice Commission and the OSCE/ODIHR remain at the disposal of the authorities of Montenegro for any further co-operation.