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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**DRAFT JOINT OPINION
ON THE DRAFT LAW ON AMENDMENTS AND SUPPLEMENTS
TO THE LAW ON THE ELECTION OF COUNCILLORS
AND MEMBERS OF PARLIAMENT
OF MONTENEGRO
as amended through July 2006**

**by the Venice Commission
and
the OSCE Office for Democratic Institutions
and Human Rights (OSCE/ODIHR)**

on the basis of comments by

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**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

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I. INTRODUCTION

1. The Council of Europe – Commission on Democracy Through Law (“the Venice Commission”) and the Organization for Security and Cooperation in Europe – Office for Democratic Institutions and Human Rights (OSCE/ODIHR) received a request from the Parliament of Montenegro to conduct a review of a working version of the Law on Amendments and Supplements to the Law on Election of Councilors and Members of Parliament (hereinafter the draft Law), prepared by a multi-party working group. This request was submitted on 23 March 2010. The joint assessment below takes into consideration previous findings and recommendations made by the OSCE/ODIHR in its final reports from election observation missions in Montenegro as well as progress made by authorities and political parties in Montenegro in their endeavors to improve the legal framework for elections and meet Council of Europe and OSCE commitments and other international standards.

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 elections in Montenegro. Discussions about harmonising the Election Law with the Constitution of Montenegro, which would require the support of a two-thirds parliamentary majority, were stalled in the parliamentary working group over the lack of agreement regarding implementation of the constitutional provision for “authentic representation” of national minorities in parliament.

3. As of March 2009, 38 political parties were registered in Montenegro, of which 12 represented national minority groups. As these political parties have disparate views on how to best legislate the constitutional requirement of “authentic representation”, the OSCE/ODIHR recommended in 2009 that there be political consensus on legal amendments aimed at meeting the constitutional provision for “authentic representation” of national minorities in parliament.¹ However, efforts to implement the provisions on “authentic representation” have, to date, been unsuccessful.

4. The present Draft Law on Amendments and Supplements to the Law on Election of Councillors and Members of Parliament of Montenegro (“the Draft Law”) was prepared by a multi-party working group. In addition to review of the Draft Law, which enjoys the support of a majority of working group members, the proposals of individual political parties were also reviewed.

5. The Draft law includes, in addition to amendments concerning authentic representation of minorities, amendments of a technical nature focused on several operational aspects of the electoral process. The draft Law addresses many of the most significant issues raised by the OSCE/ODIHR in previous assessments and election reports,² and takes measures to bring the electoral law in line with Council of Europe and OSCE commitments and other international standards. Such improvements include:

- Efforts to provide for “authentic representation” of national minorities;
- Assurance that electoral candidates cannot serve on election management bodies;
- Provision of training to election management body members; and
- Improved transparency in the system of seat allocation.

¹ OSCE/ODIHR Election Observation Mission Final Report on Montenegro Early Parliamentary Elections, 29 March 2009, paragraph 20 of recommendations.

² See, for example: OSCE/ODIHR Election Observation Mission Final Report, Montenegro Early Parliamentary Elections 29 March 2009 (Warsaw, 10 June 2009).

6. However, other issues remain in the Election Law which must be addressed to further improve the legal framework for elections and to ensure Montenegro's fulfilment of its Council of Europe and OSCE commitments. Such issues requiring amendment include:

- Overly long residency requirements for national elections;
- Restrictions on the right to run as an independent candidate;
- Inequitable representation for political parties on election management bodies.

7. This Opinion is based on consideration of the following documents:

- The Constitution of Montenegro;
- The Law on the Election of Councillors and Representatives as amended through July 2006 (CDL-EL(2010)010);
- The draft Law on the election of councillors and representatives (CDL-EL(2010)011);
- The Council of Europe Framework Convention for the Protection of National Minorities (Strasbourg, 1 December 1995; ETS No. 157);
- The Code of Good Practice in Electoral Matters adopted by the Venice Commission (Venice, 18-19 October 2002; CDL-AD(2002)023rev);
- The OSCE/ODIHR Election Observation Mission Final Report, Montenegro Early Parliamentary Elections 29 March 2009 (Warsaw, 10 June 2009); The Opinion on the Constitution of Montenegro adopted by the Venice Commission at its 73rd Plenary Session (Venice, 14-15 December 2007; CDL-AD(2007)047);
- The report on Dual Voting for Persons belonging to National Minorities adopted by the Council for Democratic Elections at its 25th meeting (Venice, 12 June 2008) and the Venice Commission at its 75th plenary session (Venice, 13-14 June 2008; CDL-AD(2008)013);
- The report on the conformity of the legal order of the Republic of Montenegro with the Council of Europe standards (September 2006);
- The Law on Minority Rights and Freedoms (10 May 2006);
- The opinion of the Advisory Committee on the Framework Convention for the Protection of National Minorities adopted on 28 February 2008 (Strasbourg, 6 October 2008; ACFC/OP/I(2008)001);
- The report on Electoral law and national minorities adopted by the Venice Commission (Venice, 25 January 2000; CDL-INF(2000)004-e); and
- The report on electoral rules and affirmative action for national minorities' participation in decision-making process in European countries adopted by the Venice Commission (Venice, 11-12 March 2005; CDL-AD(2005)009).

8. This Opinion is based on unofficial English translations of the Election Law, Draft Law, and Constitution, and does not warrant the accuracy of the translations reviewed. Any legal review based on translated laws may be affected by issues of interpretation resulting from translation.

9. The present Opinion was adopted by the Council for Democratic Elections at its ... meeting and by the Venice Commission at its ... plenary session (Venice, ...)

II. PROVISIONS REGARDING PARTICIPATION OF NATIONAL MINORITIES

A. General Remarks

10. The Preamble of the Constitution of the Republic of Montenegro enumerates the national minorities living in Montenegro: "The determination that we, as free and equal citizens, members of peoples and national minorities who live in Montenegro: Montenegrins, Serbs,

Bosniacs, Albanians, Muslims, Croats and the others, are committed to democratic and civic Montenegro.”

11. As regards the ethnic composition of the country, according to a 2003 census, 43 per cent of Montenegro’s population identified themselves as Montenegrins, 32 per cent as Serbs, 12 per cent as Bosniacs and Muslims, 5 per cent as Albanians, 1 per cent as Croats, while 7 per cent were categorised as “others”. The Roma population is also estimated to be around 20,000, including refugees from Kosovo.³

12. Montenegro adopted a new Constitution in October 2007. Article 79 of the Constitution lists minority rights, namely the rights and liberties of persons belonging to minority nations and other minority national communities, which they can exercise individually or collectively with others. According to paragraph 9 of Article 79, these rights include “the right 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”. This constitutional goal has to be realised by the provisions of the draft Law.

13. In 2006, the Law on Minority Rights and Freedoms introduced the principle of affirmative action for national minorities. Indeed, Article 23 provides for an additional mandate in the Parliament of Montenegro for minorities that make up between 1 and 5% of the total population, and for three guaranteed mandates in the Parliament for minorities exceeding 5% of the total population. Similar provision was made by Article 24 for additional minority representation in local self-government. However, on 11 July 2006, the Constitutional Court by a majority held that these provisions were inconsistent with the Constitution, since they conflicted with the principle of the equality of all citizens before the law guaranteed by the Constitution, and were, in effect, an attempted amendment of the Constitution by the Parliament.⁴ The Report on the conformity of the legal order of the Republic of Montenegro with the Council of Europe standards observes that:

“110. The implications of the decision of the Constitutional Court will need to be carefully considered, including in the context of the monitoring of the Framework Convention. Due attention to the principle of non-discrimination will need to be paid. In the absence of European standards, the Republic of Montenegro is free in its decision on whether to introduce specific seats for national minorities or not, in a non-discriminatory manner. It should be borne in mind that persons belonging to minorities often vote for “mainstream” parties in Montenegro.”⁵

14. Article 15 of the Framework Convention for the Protection of National Minorities (FCNM) prescribes that “the Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them”. The explanatory report underlines the importance of the effective participation of persons belonging to national minorities in the decision making processes and elected bodies at both national level and local levels.

³ OSCE/ODIHR Election Observation Mission Final Report on the Montenegro Parliamentary Elections of 10 September 2006 (Warsaw, 28 December 2006), p. 15.

⁴ Report on the conformity of the legal order of the Republic of Montenegro with the Council of Europe standards. See also the Venice Commission’s Opinion on the revised draft law on exercise of the rights and freedoms of national and ethnic minorities in Montenegro (Venice, 18-19 June 2004; CDL-AD(2004)026).

⁵ OSCE/ODIHR Election Observation Mission Final Report, Montenegro Early Parliamentary Elections 29 March 2009, (Warsaw, 10 June 2009), page 15.

15. The Code of Good Practice in Electoral Matters of the Venice Commission contains a specific provision concerning protection of minorities, stating that “[c]ertain measures taken to ensure minimum representation for minorities either by reserving seats for them or by providing for exceptions to the normal rules on seat distribution, e.g. by waiving the quorum for the national minorities’ parties, do not infringe the principle of equality.”⁶

16. The Venice Commission Code of Good Practice in Electoral Matters further provides some of the basic principles for developing electoral affirmative action rules in accordance with Europe’s electoral heritage, including:

- a) Parties representing national minorities must be permitted.
- b) Special rules guaranteeing national minorities reserved seats or providing for exceptions to the normal seat allocation criteria for parties representing national minorities (for instance, exemption from a quorum requirement) do not in principle run counter to equal suffrage.
- c) Neither candidates nor voters must find themselves obliged to reveal their membership of a national minority.
- d) Electoral thresholds should not affect the chances of national minorities to be represented.⁷

17. The Report on the dual voting of persons belonging to national minorities also offers advice on the different arrangements of the electoral system that may facilitate minority representation.⁸ The report underlines that special provisions on minorities’ voting rights do not necessarily conflict with the principle of equality but could be considered as an example of reverse discrimination. Therefore, they have to be justified according to the principle of proportionality, which means that they do not violate the principle of equality if and as far as they are necessary to cover the gaps and difficulties that hamper the participation of minorities in public life.

B. Electoral rights and protection of national minorities

18. The draft law introduces a system of “authentic” representation of minorities which is based on the following principles:

- affirmative action is extended to all minority groups (not only the Albanians as previously);
- not only political parties and coalitions, but also groups of citizens may submit lists of candidates;
- two different kinds of measures of affirmative action are foreseen for larger minority groups and for smaller ones (less than 2%);
- the declaration of belonging to a minority group is purely voluntary: there is no maximum numerical threshold for a national group to benefit from the

⁶ Venice Commission Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev, par. 23.

⁷ Report on electoral rules and affirmative action for national minorities’ participation in decision-making process in European countries (CDL-AD(2005)009, par. 68.

⁸ Report on the dual voting of persons belonging to national minorities (CDL-AD(2008)013), par. 42:

In summary:

- in presence of minorities concentrated territorially, single member districts may provide sufficient minority representation;
- proportional representation systems may assist in the representation of minorities;
- some forms of preference voting – single transferable vote (proportional system), alternative vote (majority system) – may facilitate minority representation in connection with ranking candidates in order of choice by voters;
- lower threshold (or exemption from the threshold) may enhance the integration of national minorities in governance;
- delimitation of electoral districts should facilitate equitable representation.

affirmative measures foreseen in the law (Montenegrians and Serbs lists are free to declare that they represent a minority group);

- the votes expressed in favour of a certain minority are not lost;
- there are no reserved seats: in order to obtain a seat it is necessary to have received a certain number of votes; in certain conditions, however, the smallest minorities are guaranteed a seat despite being below the natural threshold provided that they reach a lower threshold.

19. The Venice Commission and the OSCE/ODIHR recall that countries have to develop a wide diversity of mechanisms in accordance with their historical and legal traditions, and the political system. Montenegro has developed an original system, which both institutions generally consider in conformity with the Constitutional European Heritage. Details are addressed below.

20. Article 21 of the Draft Law, dealing with Article 38(2) of the Election Law, replaces the words: "Political parties" with the words "Submitters of lists of candidates referred to in paragraph 1 of this Article". The provision extends the scope of those entitled to propose electoral lists from political parties to groups of citizens. According to Article 23, a "political party, a coalition of political parties or a group of voters taking a stand at elections" might take part in the elections. This is a welcome amendment as it makes the participation of national minorities possible without the necessity of founding a political party.

21. Article 22 of the Draft Law, amends Article 39(4) of the Election law, replacing the words: "representing Albanians in Montenegro" by the words: "representing minority nations and other minority national communities". This article extends the affirmative action from the representatives of the Albanian minority to all minority nations and minority national communities in general. This same amendment is reflected in other articles throughout the draft Law, including Article 25 which refers to Article 43 of the Election law. In all instances, this measure helps to ensure all minorities are granted an opportunity for representation and is a welcomed amendment in line with past OSCE recommendations which expressed concern that protected minority status was extended only to Albanians in Montenegro at the exclusion of other groups.

22. The possibility of the representation of the same national minority by several lists is in accordance with European standards. In examining a regulation that linked the registration of "organisations of citizens belonging to national minorities" to parliamentary representation and high threshold, the Venice Commission has been critical, stating that:

*"... the Commission is of the opinion that the conditions for registration may not be of such a severity that they disproportionately favour groups which are represented in Parliament to the disadvantage of (new) groups which wish to participate in public life." This could result "in excluding significant parts of national minorities from representative and consultative bodies, as well as from a range of participation rights, which would seem out of proportion."*⁹

23. The English translation of the draft law indicates the deletion of Article 12(3), which does not exist in the English translation of the Election Law. If 12(3) is a mistake in translation and this amendment seeks to remove 12(2) from the law, then this would be a consistent technical amendment. *It is recommended that the original language version of the draft Law be checked to ensure that the appropriate amendment has been made.*

⁹ CDL-AD(2005)026, para. 48-50.

24. The draft Law provides additional guidance on requirements for the establishment of electoral lists on the basis of minority interests. A new Article 43(3) states as follows: "A list of candidates for election of MPs of a political party or a group of citizens representing a minority nation or other minority national community participating in the total population to 2% shall be established if it is supported by signatures of minimum 300 voters" while electoral lists of political parties representing national minorities making up more than 2% of the overall population of the country need to be supported by 1,000 signatures. This provision is a welcome development which can help ensure the active participation of minorities in political life. In addition, a reference to the last census should be included in the law. The issue could be raised whether the number of signatures required should not depend also on the importance of the minority for municipal elections, whereas the present Law¹⁰ provide for 200 signatures for each minority.

25. Article 26 adds a further document to the list of documents to be submitted together with the electoral list to the election commission: the written statement of the submitter of the list of candidates states that they are taking stand in elections for authentic representation of a minority nation or other minority national community.

26. According to Article 36 of Draft Law, amending Article 94 of the Election Law, the general threshold for participation in the allocation of mandates is 3 %. However, there is an exceptional rule for lists of candidates that stand for elections for authentic representation of a specific minority nation or minority national community: "in case none of them meets the condition referred to in paragraph 1 of this Article and if they individually acquire at least 0.7% of valid votes, these lists shall acquire the right to participate in distribution of seats as a single (i.e. collective), list of candidates with the total number of acquired valid votes."

27. The text of the new Article 94, paragraph 2, should be clarified so that it appears unequivocally that the system only applies to lists having declared to represent the same minority group: if one list of a given minority receives at least 3%, no list of the same minority group below 3% may benefit from measures under paragraph 2.

28. Paragraph 3 of Article 94 also states that for the lists of candidates representing minorities with a share of the overall population up to 2 per cent, these lists participate in the allocation of seats if they receive at least 0.4 per cent of the valid votes even if they have not reached the natural threshold. In practice, this amounts to a reserved seat that appears to be introduced to address the expectations of the Croat minority. However, it is nevertheless necessary to have obtained 0.4% of votes. This paragraph should be amended to clearly state that the population figures should be based on the last census. The threshold is the object of discussion among the political leaders; the Croats have notably proposed a lower one (0.2%). While this matter is not for the Venice Commission and OSCE/ODIHR to decide, it is important that the threshold be realistically reached by the small minority groups. This provision is a welcome development in line with the Constitution of Montenegro, Article 8, which allows for special measures to be taken to ensure equality and eliminate discrimination.

29. Paragraph 4 of Article 94 lacks sufficient detail on how the mandates will be distributed to the "collective lists of candidates". The law establishes three separate allocations: (1) allocations under the 0.4% threshold; (2) allocations under the 0.7% threshold; and (3) allocations under the 3% threshold. Obviously, mandate allocations under one of the allocations will affect how many mandates remain to be allocated under the two remaining allocations. The law should state each step for allocation under each separate allocation. It is

¹⁰ Law on the Election of Councillors and Representatives as amended through July 2006 (CDL-EL(2010)010), Article 43.2. See also the draft Law on the election of councillors and representatives (CDL-EL(2010)011), Article 25.

recommended that the law state each and every step of the allocation process for all mandates, anticipating mathematical anomalies and unexpected voting results.

III. THE ELECTORAL PROCESS

A. Electoral System

30. Article 3 of the Election Law provides that each municipal assembly shall have 30 councillors and an additional councillor per every 5,000 voters. This results in a municipal assembly that is larger than necessary in some municipalities. *It is recommended that Article 3 be amended to reduce the minimum number of councillors elected in each municipality. The minimum number for each municipality should be tied to the number of voters in the municipality so that the size of the assembly better reflects the comparative size of the municipality.*

31. Positively, Article 38 of the Draft Law makes changes to the electoral system. Previously, per Article 96 of the Election Law, half of the seats won by an electoral list were awarded based on the list order of candidates while the other half was awarded at the discretion of list submitters. This practice misleads voters and reduces the representativeness of the elections. This provision also results in elected representatives being less accountable to voters. Moreover, party discretion over one half of the seats won contradicts transparency standards normally associated with democratic systems. The OSCE/ODIHR has repeatedly brought these issues to the attention of the authorities and the political parties in Montenegro for revision. The alteration proposed in the draft Law, which ensures all seats won by an electoral list are awarded on the basis of list order, is a welcome one.

B. Right to be elected and hold mandate

32. Although Article 21 of the Draft Law expands Article 38 of the Election Law to provide for "submitter of lists", it still does not provide for the candidacy of citizens as independent candidates. Restriction on the ability of a citizen outside of a political party or organised citizens group to exercise the right to be elected to public office as an individual and is contrary to Paragraph 7.5 of the 1990 OSCE Copenhagen Document. Paragraph 7.5 of the 1990 OSCE Copenhagen Document requires that citizens be permitted "to seek political or public office, individually or as representatives of political parties or organizations, without discrimination." Candidates seeking office must be permitted to run as independent candidates. Additionally, candidates, regardless of party affiliation or lack of party or group affiliation, cannot be discriminated against. *It is recommended that the Election Law be amended to provide for the right of an individual to seek public office as an independent candidate.*

33. 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. However, the law does not provide any guidance regarding the status of coalition partners during the campaign in terms of their media access, funding and expenditures, or conditions and subsequent rules which are to be applied when a coalition ceases to exist. *It is recommended that the Election Law be amended to clearly state the legal status of representatives, councilors, and their representatives to election commissions in the event that a coalition or party is dissolved. Further, it is recommended that the Election Law be amended to clearly define the circumstances under which a coalition ceases to exist and the official manner in which such a decision is to be reported. It is also recommended that the legal framework be amended to more clearly define the rights or restrictions on coalition partners during the campaign period, their funding and access to the media. Particularly, the legal framework should be amended to ensure that coalitions are not granted significant advantage over political parties running alone.*

34. National minority parties must list a single minority nation or minority national interest group if they wish benefit of affirmative action provisions (Draft law, Article 39a). This does not forbid political parties or groups representing several minorities to form a coalition list, but in that case the general threshold of 3% will apply to this list.

C. Right to vote

35. The Election Law provides that a Montenegrin citizen should be the 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, and (b) for at least 12 months prior to the polling day to have the right to elect and be elected as a councillor. Although a residency requirement is considered acceptable for local or regional elections, the length of twenty four months for national elections and 12 months for local elections could not be considered as a reasonable restriction.¹¹ The draft Law suggests changes in the respective articles of the Election Law¹², however, the proposed changes are essentially linguistic: the period of twenty four months (as referred to in the Election Law) is changed to “two years” (the draft Law). Thus, the issue of unreasonable length of the residency requirement remains unaddressed. *It is recommended that the residence requirement in national elections is removed from the Law, and the residency requirement in local elections is lowered to not more than six months.*

D. Secrecy of the vote and exit polls

36. Article 2.2 of the Draft Law stipulates that no one may ask voters to say who they have voted for or why they have not voted. However, it is usual in democratic countries to allow exit polls. Instead of forbidding anyone to ask about voting decisions, the secrecy of vote could be guaranteed by foreseeing sanctions for the violation of voting secrecy. *It is recommended that consideration be given to amending this article to allow for exit polls to be conducted for consenting voters.*

E. Election material

37. 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. Consideration should be given to the amendment of this provision, Article 77 of the Election Law, as it could potentially compromise citizens' privacy and in small communities possibly even impact the secrecy of the vote. Arguably such a provision also runs counter to the constitutional protection of personal data, Article 43 of the Constitution of Montenegro.

F. Election Administration

38. The system of administration for elections in Montenegro, consisting of the State Election Commission (SEC), Municipal Election Commissions (MECs), and Polling Boards (PBs) in every polling station, is generally effective in its structure and efficient in its organisation. The SEC and MECs have permanent members appointed by the National Assembly (Parliament) and the relevant Municipal Assembly respectively for a four-year term of office (Election Law, Articles 18-19). Permanent members of the SEC and the MECs and their deputies must be lawyers (Articles 25(6), 30(6)). The MECs appoint members of polling boards only for the election period.

¹¹ 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.

¹² Article 8 of the draft Law suggests amending article 11 of the Election Law (Suffrage).

39. The Election Law provides that the two opposition parties represented in the respective assemblies, which won the largest number of votes in the last election, are entitled to appoint one permanent member to each of the three levels of the election administration (SEC, MECs and PBs), whereas the rest of the permanent members of the commissions are in practice considered to be appointees of the political parties (or coalitions of parties) that have the majority in the assemblies. In addition to 'permanent' members, all electoral bodies have an 'extended' composition that includes authorised representatives of all registered candidate lists. However, the extended composition comes too late in the electoral process: extended members can take active participation in decisions of the election commission only within 15 days of the election (Election Law, Articles 26(3), 31(4)), after important decisions and instructions have been issued by an election commission.

40. As described above, previous OSCE/ODIHR reports have highlighted concerns over the failure of the Election Law to guarantee political plurality on the permanent membership of election commissions. *It is therefore recommended that the Election Law be amended to ensure political plurality in the membership of the permanent composition of the SEC, MECs and PBs. Similarly, there should be a proportional representation for national minorities on MECs and PBs in areas where they are present.*

41. Positively, the Draft Law introduces Article 20(2) to the Election Law, which prohibits persons standing as candidates in an election from also holding positions as members of election commissions. This is a welcome amendment.

42. Prior OSCE/ODIHR Election Observation Mission Final Reports have identified other areas where amendment to the Election Law would improve election administration. The recommendations below are provided to assist authorities in their efforts to make improvements in the area of election administration. These recommendations remain unaddressed in the Draft Law.

- It is recommended that the mandate of the SEC should be expanded to guarantee that it co-ordinates and supervises municipal as well as republican 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 MEC members be respected without premature termination based on the basis of political shifts in Municipal Assemblies.
- It is recommended that the Election Law be amended to require that government and municipal authorities provide the SEC and MECs with meeting space that is adequate and capable of accommodating all permanent and extended members, as well as representatives of accredited observer groups.
- It is recommended that the Election Law be amended to require that the SEC and MECs provide adequate and timely notice of all meetings to representatives of accredited domestic observer groups.

43. Positively, in response to previous recommendations, the Draft Law extends Article 27(4) of the Election Law to ensure that the Municipal Election Commission provide for and organise training for all polling board members. This is a welcome amendment.

G. Voting Procedures

44. Article 85 of the Election Law, which is unchanged in the draft Law, permits mobile voting for registered voters "who cannot vote at the polling station (handicapped persons or those

prevented in some other way)". Mobile voting is administered by a single member of the polling board (the member in charge of voting by post). Secrecy of the ballot is safeguarded, in theory, by the voter placing the ballot paper in a separate envelope "which is then sealed and wax-stamped in his presence by the member of the Polling Board." After the envelope is returned to the polling board, the voter's eligibility is verified and the envelope is placed in the ballot box.

45. The provision on mobile voting is subject to abuse as it permits a voter's marked ballot to be within the exclusive possession and control of a single member of the polling board before it is delivered to the polling station ballot box. *It is recommended that the law be amended to provide, at a minimum, that two members of the polling board, who are not of the same political party, administer mobile voting together within the geographical territory covered by a polling station.*

46. In addition, Article 85 does not provide how ballot coupons are to be detached and handled during mobile voting. Further, in the English translation, the phrase "such an elector to cast his vote, by post" is found in Article 85. The phrase "by post" may have been inserted in the English translation by mistake. *It is recommended that Article 85 be amended to address the issue of handling of ballot coupons, and clarified so that it is clear that mobile voting has nothing to do with voting by post.*

47. The removal of ballot coupons in regular voting, as defined in Election Law Article 82(3), is also troublesome. This article requires a voter to fold the marked ballot in such a way that the vote is hidden and then take the ballot to a polling board member for the removal of the voter coupon. It is unclear why such a control coupon could not be removed prior to marking the ballot, although still after a voter has verified their identity and eligibility. *It is recommended that an amendment to this article be considered which allows for the removal of control coupons prior to the marking of ballots. This would provide enhanced protection of ballot secrecy.*

48. 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, in particular in those instances in which 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

49. The OSCE/ODIHR noted in the 2009 elections that the SEC made results available on its website, which were broken down to the polling station level. This is a positive practice. However, this positive practice is not expressly stated in the Election Law. Nor does the Election Law include a requirement that results be publicly posted at the polling station level. Nor does the law require that the tabulations of results from polling stations be publicly posted at the Municipal Election Commission level. *It is recommended that the Election Law require that all voting results, protocols, tabulation and tally sheets, and decisions determining or affecting election results, be publicly posted as soon as possible and without any delay. Such electoral documents should be publicly posted at all levels of election administration, including polling, municipal, and Republican election commission levels. Detailed tabulations of overall results, including the voting results in each polling station, should be publicly posted at each election commission. The Election Law should include a specific obligation for publication and dissemination of results as soon as practicable.*

I. Repeat Elections

50. 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.

Article 103 requires repeat polling to take place no later than seven days. 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. Article 34 of the Draft Law amends Article 81 of the Election Law. However, Articles 83 and 89 have not been amended. Thus, it is unclear to what extent a margin of appreciation has been extended to the election administration in regard to inconsequential violations.

51. It is important to ensure efficient election administration while at the same time protecting the integrity of the election processes. Positively, 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. *However, it is recommended that similar consideration be given to amending Articles 83 and 89 so that repeat polling is required only where, due to any of the discrepancies listed above, the particular discrepancy could have affected the allocation of mandates except in case of gross violation of the law. Repeat polling should in principle not be held where an electoral irregularity or misdeed could not have affected the allocation of mandates.*

IV. CONCLUSIONS

52. 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. However, the Draft Law does not take the opportunity for implementing other pending issues as described above, requiring further amendments to ensure the Election Law is fully in line with Montenegro's Council of Europe and OSCE commitments and international commitments.

53. Regarding the authentic representation of minorities, the use of a uniform model for all minority nations or other minority national communities without reserved seats is introduced by the Draft Law. The Code of Good Practice in Electoral Matters illustrates that special rules guaranteeing national minorities reserved seats or providing for exceptions to the normal seat allocation criteria for parties representing national minorities (for instance, exemption from a quorum requirement) do not in principle run counter to equal suffrage.¹³ However, guaranteeing reserved seats is not an indispensable way of affirmative action.

54. The Draft law operates with a lower quorum requirement in order to secure authentic representation of minorities. There is a debate among the political parties on the measure of the quorum. It is difficult to give an opinion on this issue in an abstract way. The actual size of minorities should be taken into account. All circumstances and the impact of the provision on the entire electoral system have to be balanced.

55. The provisions of the Draft Law related to the authentic representation of national minorities are in conformity with the Constitution, with European standards and with the previous Venice Commission and OSCE/ODIHR recommendations. However, a more detailed elaboration of the proposed provisions would help increase understanding and evaluation of the draft provisions, as the interrelations between the Draft Law and other pieces of legislation are quite complicated. The provisions of the Draft Law, it should be noted, have to conform not only with the Constitution but also with the Law on Voter Registers, Law on Financing of Political Parties, and Law on Minority Rights and Freedoms, as well as with the decisions of the Constitutional Court.

¹³ Code of Good Practice in Electoral Matters (CDL-AD(2002)23rev), 2.4. b.