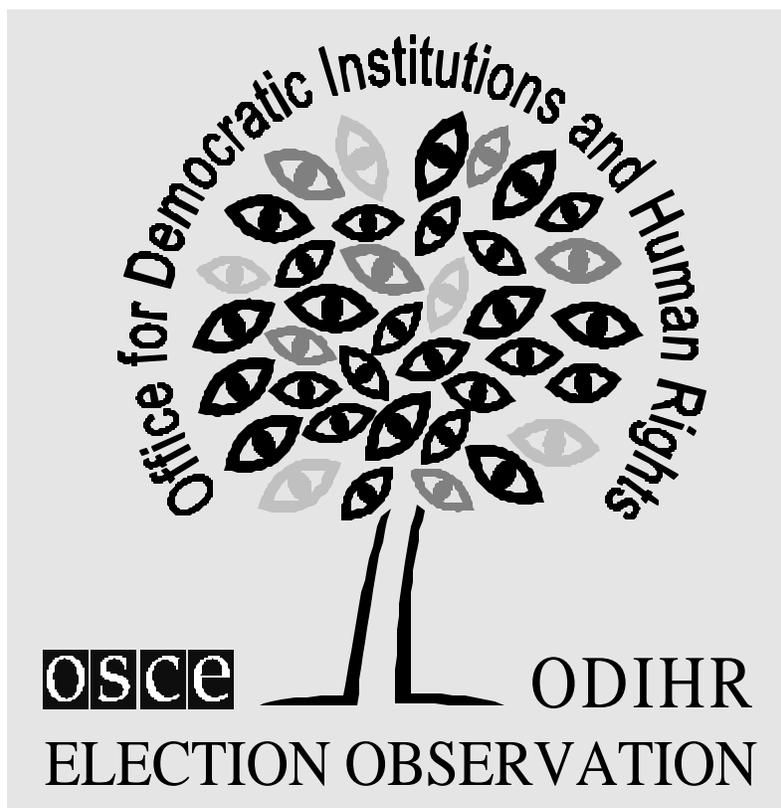




Office for Democratic Institutions and Human Rights

**ASSESSMENT OF THE DRAFT REFERENDUM LAW
FOR CONDUCTING REFERENDUM ELECTIONS
IN THE REPUBLIC OF MONTENEGRO**



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ASSESSMENT OF THE DRAFT REFERENDUM LAW FOR CONDUCTING REFERENDUM ELECTIONS IN THE REPUBLIC OF MONTENEGRO

I. INTRODUCTION

- 1.1 This assessment reviews and comments on the *draft* referendum law for conducting referendum elections in the Republic of Montenegro.¹ This assessment is based on unofficial English translations of the following: (1) the draft law, consisting of forty (40) articles, (2) the current Referendum Law of the Republic of Montenegro (published in the Official Gazette of the Republic of Montenegro, No. 3/92 and as amended and published in the Official Gazette of the Republic of Montenegro, No. 7/92)², (3) the Law on the Election of Councillors and Representatives of the Republic of Montenegro³, (4) the Law on Registers of Electors of the Republic of Montenegro,⁴ (5) the Citizenship Law of the Republic of Montenegro⁵ 1999, (6) Constitution of the Republic of Montenegro 1992, (7) Constitution of the Federal Republic of Yugoslavia 1992, and (8) Citizenship Law of the Federal Republic of Yugoslavia (published in the Official Gazette of the Federal Republic of Yugoslavia, No. 33/96).
- 1.2 This assessment reviews and comments on the text of the draft law only, and should not be construed as an endorsement or recommendation for or against a referendum election in the Republic of Montenegro. Nor should this assessment be construed as a substantive approval or disapproval of any question that may be subsequently decided by a referendum election.
- 1.3 This assessment does not guarantee the accuracy of the translations reviewed. Unfortunately, mistakes do occur in translations and “shall”, on occasion, becomes “may” and “may” becomes “shall”. Obviously, such a mistake in translation results in erroneous assessment of text.
- 1.4 This assessment supersedes the "Assessment of the Legal Framework for Conducting Referendum Elections in the Republic of Montenegro published" by OSCE/ODIHR on 7 December 2000.
- 1.5 This assessment is prepared for the Office for Democratic Institutions and Human Rights of the Organisation for Security and Co-operation in Europe (“OSCE/ODIHR”).

II. EXECUTIVE SUMMARY

- 2.1 The draft law represents a substantial improvement on the existing law, but could be improved to adequately ensure transparency in the counting and tabulation of the voting results of a referendum election.

1 Herein “the draft law”.

2 Herein “the current Referendum Law”.

3 Herein “the Election Law.”

4 Herein “the Voter Register Law”.

5 Herein “the Citizenship Law”.

- 2.2 Provisions in the draft law regulating the voting processes could be improved and specific recommendations have accordingly been made.
- 2.3 The draft law fails to adequately provide for election observation in a referendum election.

III. COMMENTS AND RECOMMENDATIONS

A. Transparency in the Count/Tabulation of Referendum Results

- 3.1 Articles 24 and 31 of the draft law provide that the polling board shall establish the results of voting at the polling station. Article 31 requires the polling board to establish both the number of citizens who have voted "for", and the number of citizens who have voted "against" the questions posed in referendum. Article 31 requires this information to be "entered into the Record, that is the Report by the body in charge of administering the referendum".
- 3.2 **It is recommended** that Article 31 be amended to expand the information to be established by the polling board. As a minimum, Article 31 should be expanded to include the ballot and voting information that is set forth in Article 32, and the number of spoiled and invalid ballots.
- 3.3 **It is recommended** that Article 32 should also be amended to require that the number of spoiled and invalid ballots be included in the announced data.
- 3.4 One of the most significant shortcomings of the draft law is its failure to require that results be publicly posted at the polling station level. Another significant shortcoming is the failure to require that the tabulations of results from polling stations be publicly posted at the municipal commission level. The failure of the draft law to require public posting of polling station results and municipal commission tabulations raises a serious concern about the transparency of the referendum process. **It is recommended** that the draft law be amended to require that *all* voting results, protocols, tabulation and tally sheets, and decisions determining or affecting referendum 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 Republic Commission levels. *Detailed tabulations of overall referendum results, including the voting results in each polling station, should be publicly posted at each commission.*

B. Mobile Voting

- 3.5 Article 24 of the draft law provides that two members of the polling board shall be charged "with the duty of administering the voting outside the polling station". It is assumed that Article 24 refers to mobile voting as Article 25 of the draft law incorporates the provisions of the Election Law regarding "election material" and "voting" to the extent they are not already governed by other articles in the draft law. Other than Article 24, the draft law does not address the issue of mobile voting. Article 85 of the Election Law does address mobile voting. Article 85 of the Election Law permits mobile voting for registered voters "who cannot vote at the polling station

(handicapped persons or those prevented in some other way)”. Thus, it is assumed that the draft law Article 24 provision for “voting outside the polling station” is limited to Election Law Article 85 mobile voting. Article 24 minimally changes the Article 85 mobile voting process, as it requires two polling board members instead of one to administer the mobile voting.

- 3.6 As mobile voting can be subject to abuse, **it is recommended** that the law require, where possible, that the two members of the polling board who administer mobile voting be from different political parties.
- 3.7 **It is also recommended** that Article 24 of the draft law be amended to specifically state that all other provisions governing the voting process, such as the use of indelible ink and the manner of detaching ballot coupons, shall apply to mobile voting. The law should clearly state that all procedural safeguards for regular voting also apply to mobile voting.

C. Form of the Ballot and Secrecy of the Vote

- 3.8 Article 25 of the draft law incorporates the provisions of the Election Law regarding “election material” and “voting” to the extent not already governed by other articles in the draft law.
- 3.9 Article 28 of the draft law, similar to Article 73a of the Election Law, provides that each ballot shall be printed with a ballot coupon. The ballot coupon contains a unique serial number and is perforated so that it can be detached after the voter marks the ballot.
- 3.10 The draft law fails to describe how the ballot coupon shall be detached from the voter’s ballot. Thus, it is assumed that the manner of detaching the coupon will be in accordance with the provisions of the Election Law. This is problematic as secrecy of the ballot may be compromised by the ballot detachment provisions set forth in the Election Law.
- 3.11 A ballot coupon, containing a unique serial number, is an acceptable method for ballot security. However, the procedure provided in the Election Law by which the ballot coupon is detached from the marked ballot raises concern. Article 82 of the Election Law requires the voter, after marking the ballot, to fold the ballot in a manner that keeps the manner of marking secret, hold the ballot, and to allow a member of the polling board to detach the ballot coupon. After the member of the polling board detaches the ballot coupon, the voter places the marked ballot in the ballot box. Article 82 is troublesome as it permits a member of the polling board to handle, albeit in a limited manner, the *marked* ballot of a voter *before* the ballot is placed in the ballot box. A preferable method would be for the voter, not a member of the polling board, to detach the ballot coupon from the marked ballot. Then, the voter should place the marked ballot in the ballot box and the detached coupon in a receptacle for ballot coupons. It is unacceptable for a member of the polling board to handle the voter’s *marked* ballot before it is placed in the ballot box. Ballot security will not be compromised if the voter, instead of a member of the polling board, detaches the ballot coupon and places it in the appropriate receptacle. Alternatively, **it is recommended** that the coupon be detached when the ballot is issued to the voter.

D. Use of Ink to Mark Voters in a Republic Referendum Election

3.12 Article 30 of the draft law requires that indelible ink spray and ultra-violet light machines for checking the ink be used in a Republic Referendum. Article 30 does not specifically prohibit a voter, who refuses to be inked or checked for ink, from voting. **It is recommended that** Article 30 should be amended to specifically prohibit a voter, who refuses to be inked or checked for ink, from voting. Article 30 should also be amended to specifically state that it applies to mobile voters as well as regular voters. Consideration should also be given to amending Article 30 to extend its application to a Municipal Referendum election.

E. Observers for Referendum Elections

3.13 Article 30 of the current Referendum Law specifically incorporates the provisions of the Election Law regarding “participation of domestic and foreign observers” to the extent not governed by other articles in the current Referendum Law. The current Referendum Law is silent on the matter of observers and, thus, under the current Referendum Law, the Election law controls. A gap has been created with the draft law as Article 25 of the draft law, the successor to Article 30 of the current Referendum Law, makes no mention of domestic or foreign observers. This omission may be explained by Article 16 of the draft law, which states that the “work of the referendum administration bodies shall be public”. Thus, it is unclear as to whether Articles 111a through 111g of the Election Law, which regulate domestic and international observers, have any application to referendum elections. This unclear situation is due to the absence from Article 25 of the draft law of the phrase “participation of domestic and foreign observers”, coupled with the new statement found in Article 16 of the draft law. *Regardless of whether Articles 111a through 111g of the Election Law should apply to a referendum election, the legal framework fails to adequately provide for election observation in a referendum election. This failure is due to the inadequacy of Article 16 of the draft law and the shortcomings of Articles 111a through 111g of the Election Law.*

3.14 The requirement in Article 16 of the draft law that “the work of the referendum administration bodies shall be public” is insufficient to ensure transparency of the referendum election processes. **It is recommended that** Article 16 should be expanded with clear and precise provisions establishing the rights of observers to inspect documents, attend meetings, monitor election activities at all levels at all times, and to obtain copies of protocols and other documents at all levels. The law should also establish an expedited process for observers to obtain corrective relief when an election administration body denies the rights of an observer, including the right to be registered as a domestic observer.

3.15 **It is recommended that** the provisions in the Election Law, which provide for observers, Articles 111a through 111g, should be clarified to enhance the observation process. This is necessary in the event that it is determined that these articles apply to a referendum election.

3.16 Article 111b provides for the registration of domestic observers, which shall take place no later than five days before the elections. However, Article 111b does not state how soon after the election call is issued that registration of domestic observers is permitted.

It is recommended that Article 111b state both the dates for the start and end of registration for domestic observers.

- 3.17 Article 111d provides for the registration of international observers, which shall take place no later than ten days before the elections. However, Article 111d does not state how soon after the election call is issued that registration of international observers is permitted. **It is recommended** that Article 111d state both the dates for the start and end of registration for international observers.
- 3.18 Article 111f states that “The bodies in charge of the elections are obliged to enable foreign and domestic observers to monitor the elections.” This phrase is too vague and does not adequately describe to what extent observers will be permitted to observe electoral activities and inspect electoral documents. **It is recommended** that the law provide clear and concise provisions establishing what electoral documents are subject to inspection and what electoral activities may be monitored. These provisions should allow observers to inspect documents and monitor election activities at all levels.
- 3.19 The articles providing for observers fail to establish procedures and remedies for an observer in the event the observer is denied registration or access to an electoral document or event. **It is recommended** that the law provide clear and precise provisions establishing an expedited process by which observers may obtain corrective relief when an election administration body denies the rights of an observer, including the right to registration. A special procedure should be set forth in the law for observers and observers should not be forced to rely on general provisions in the law related to protection of electoral rights.

F. Referendum Campaigns and the Public Media

- 3.20 Article 12 of the draft law states that each citizen has the right “to be impartially and timely informed by public media, on equal terms, about all phases of the procedure and different stands relating to the question which shall be posed at the referendum”. How this is to be achieved is determined “by the competent assembly by a separate decision”. Article 12 also establishes that referendum campaign activities “carried out by public media and rallies shall cease 48 hours before the date the referendum is to be held”.
- 3.21 Whether Article 12 is successfully implemented will be determined by the subsequent decision enacted by the competent assembly and the degree of enforcement made by competent authorities. **It is recommended** that the subsequent decision by the competent assembly be enacted in a timely manner, be understandable, and capable of objective application.
- 3.22 Article 12 does not address the issue of paid advertisements in private media. **It is recommended** to extend the Article 12 “equal terms” principle to paid advertisements in private media in order to ensure that both sides of a referendum are fully explained to voters. This could be accomplished by an amendment requiring that the same commercial rate for referendum ads be offered without discrimination to both supporters and opponents of the referendum substance, and that the times and location of the advertising be on similar terms. These suggestions are made since the Article 12 goal of informing voters *fairly* may be weakened if the “equal terms” principle regulates only public media.

3.23 The goal of Article 12 may also be circumvented if public media favours either proponents or opponents of a referendum in news coverage, political coverage, forums, or editorials. **It is recommended** that Article 12 be amended to prohibit biased coverage or treatment in State owned or controlled media, and that competent authorities be required to immediately act upon any violation. However, such regulations require caution as restrictive rules promote possible self-censorship.

G. Election Administration Bodies for Referendum Elections

3.24 Article 10 of the draft law provides that “commissions” and “polling boards” shall be responsible for administering referendum elections. Article 17 provides that a commission shall consist of “a chairman, a secretary, and a certain number of the commission members”. Article 17 also provides for deputies for the chairman, secretary, and all members. The chairman, secretary, and all members shall be selected from graduate lawyers and must be eligible to vote. The term of office for a commission lasts until the assembly that called the referendum establishes the results of the referendum.

3.25 Importantly, Article 17 of the draft law provides that “when the commission members are appointed, the proportional representation of the political parties in the assembly that called the referendum must be taken into account”.

3.26 Article 18 provides that a Republic Referendum is administered by a Republic Referendum Commission (“Republic Commission”), a commission in each municipality for the Republic Referendum, and polling boards. The Republic Commission and the commission in each municipality are appointed by the Assembly of the Republic of Montenegro⁶ no later than 10 days after the decision to call the Republic Referendum comes into force. The Republic Commission consists of a chairman, secretary, and nine members. The commission in each municipality for the Republic Referendum consists of a chairman, secretary, and seven members. The powers and responsibilities of the Republic Commission and the commission in each municipality, for a Republic Referendum, are stated in Articles 21 and 22 of the draft law.

3.27 Article 20 provides that a Municipal Referendum is administered by a commission in the municipality for the Municipal Referendum and polling boards. The Municipal Referendum commission in the municipality is appointed by the Assembly of the Municipality by an enacted decision of the Assembly. The decision appointing the Municipal Referendum commission shall also determine the number of members and duties of the commission. Article 20 does not specify the deadline, prior to the date of the Municipal Referendum, for appointment of the Municipal Referendum commission. **It is recommended** that Article 20 be amended to state the deadline for appointment of the Municipal Referendum commission. **It is also recommended** that Article 20 be amended to state the number and duties of the Municipal Referendum Commission in order to establish consistency in the administration of Municipal Referendums.

3.28 Article 23 of the draft law requires that the polling board for each polling station be appointed no later than 10 days prior to the date of the referendum. The polling board shall consist of a chairman and six members and all shall have deputies. When members

⁶ Herein “Assembly of the Republic”.

of the polling board are appointed, the proportional representation of the political parties in the assembly that called the referendum must be taken into account. In the case of a Republic Referendum, the proportional representation of the political parties in the Assembly of the Republic would have to be taken into account. In the case of a Municipal Referendum, the proportional representation of the political parties in the Assembly of the Municipality would have to be taken into account.

3.29 The chairman and members of the polling board must be eligible to vote. The polling board is responsible for voting at the polling station, ensuring the regularity and secrecy of the vote, and establishing the voting results at the polling station. The polling board is also responsible for keeping order at the polling station during the voting.

H. Protection of Citizens' Rights in a Referendum Election

3.30 Articles 13 and 34 through 38 of the draft law govern protection of citizens' rights in a referendum election. Articles 37 and 38 allow for complaints to the Constitutional Court of the Republic of Montenegro concerning actions of the Municipal Commission or Republic Commission.

3.31 **It is recommended** that Article 38 be amended by adding the phrase "or against the decision, act, or failure of the Republic Commission" at the end of the last sentence of Article 38. This language is necessary so that an erroneous decision of the Republic Commission *accepting and granting relief* on a complaint may be appealed to the Constitutional Court.

I. Repeat Elections

3.32 Article 25 of the draft law specifically incorporates the provisions of the Election Law regulating "repeated elections".

3.33 Under Article 89 of the Election Law, the polling board is dissolved, a new one appointed, and voting at the polling station is repeated if any of the following occur: (1) the ballot box in the polling station contains a larger number of ballots than the number of registered voters shown to have cast ballots, (2) the number of ballots in the ballot box is larger than the number of ballot coupons, (3) there are two or more ballot coupons with the same serial number, or (4) there are ballot coupons with serial numbers not allocated to the respective polling station. Article 103 of the Election Law requires repeat polling to take place no later than seven days.

3.34 Under Article 28 of the current Referendum Law, repeat polling is required in a polling station if irregularities occurred that could have influenced the result of the election. This provision represents improvement over the Election Law, which does not require that the irregularities could have influenced the result of the election before a repeat election is held.

3.35 **It is recommended** that either (1) Article 28 of the current Referendum Law be included in the draft law, or (2) Article 89 of the Election Law be amended to require repeat polling only where, due to a discrepancy listed in Article 89, the particular discrepancy *could have affected the election outcome at the Republic level*. Repeat polling should not be held where the discrepancy could not have affected the election results.

J. Convoking a Referendum

3.36 Article 1 of the draft law grants authority to the Assembly of the Republic to call a Republic Referendum in which the citizens of Montenegro vote on individual questions within the competence of the Assembly of the Republic. As provided by Article 81 of the Constitution of the Republic of Montenegro, this includes: (1) adopting the Constitution, (2) enacting laws, other regulations and general enactments, (3) enacting the development plan of Montenegro, budget and annual balance sheet, (4) determining principles for organisation of the state administration, (5) ratifying international treaties within the competences of the Republic, (6) announcing a republican referendum, (7) floating public loans and deciding on entering into indebtedness of Montenegro, (8) electing and dismissing president and members of the government, president and justices of the Constitutional Court, president and judges of all the courts of law, (9) appointing and dismissing public prosecutor and other officials, (10) granting amnesty for criminal offences prescribed by the republican law, and (11) performing other duties as prescribed by the Constitution. Article 1 of the draft law grants power to a municipal assembly to call a Municipal Referendum on individual questions within the competence of the municipal assembly.

3.37 Article 3 of the draft law provides that the decision on calling a referendum shall be made by the competent assembly.

3.38 Article 81(6) of the Constitution of the Republic of Montenegro authorizes the Assembly of the Republic to announce a Republic Referendum. Article 83 of the Constitution specifies that a decision on the calling of a referendum shall be brought by a majority of votes of the total number of deputies. Article 88(5) of the Constitution of the Republic of Montenegro authorizes the President of the Republic to propose to the Assembly of the Republic the calling of a referendum.

3.39 The draft law itself does not specify the number of votes needed in the Assembly of the Republic to adopt a decision to call a Republic Referendum. **It is recommended** that Article 3 of the draft law be amended to state the voting requirements of Article 83 of the Constitution of Montenegro.

3.40 The use of a majority vote decision to call a referendum, as stipulated in Article 83 of the Constitution of the Republic of Montenegro, could weaken the institutional authority of the Assembly of the Republic. Therefore **it is recommended** that consideration be given to amending the Constitution of Montenegro to provide more stringent requirements for convoking a referendum.

K. Announcement of the Decision to Call a Referendum

3.41 Article 4 of the draft law provides for the decision on convoking a referendum to be announced in the way in which regulations of the body that has called the referendum are usually announced. Article 108 of the Constitution of the Republic of Montenegro and Article 116 of the FRY Constitution stipulate that statutes, other laws and general enactments must be published and do not come into force until the eighth day from the day of publication, with some exceptions. Thus, any decision on calling a referendum should be published in the appropriate official gazette(s).

L. Binding Referendum Decisions

3.42 Article 2 of the draft law provides that decisions made by referendum shall be binding. Article 8 of the draft law states that if the body that has called the referendum is obligated to pass a law, regulation, or other general enactment as a result of the referendum, then the body has 60 days after the day of the referendum to pass the law, regulation, or other enactment.

M. Timeline for Calling and Holding a Referendum Election

3.43 Article 4 of the draft law provides that no less than 60, and no more than 100 days, may pass between the day of calling the referendum and the day of holding the referendum. However, Article 4 must be read in connection with the publication requirements of Article 108 of the Constitution of the Republic of Montenegro, which stipulates that statutes, other laws and general enactments must be published and do not come into force until the eighth day from the day of publication. Care should be taken so that the date announced for holding the referendum complies with constitutional requirements as well as Article 4 of the draft law.

N. Number of Votes Required to Approve a Referendum Question

3.44 Article 33 of the draft law provides that a decision on the referendum shall be made by a majority of votes cast, provided that a majority of the total number of eligible voters who have the right to vote in the referendum has participated in the referendum.

3.45 The requirement of a threshold of majority participation of all eligible voters is reasonable. However, Article 33 does not specify how the number of eligible voters for which the referendum is held is to be determined. **It is strongly recommended** that the law be amended to specify how the number of eligible voters shall be determined. **It is also recommended** that the law be amended to specify that this number shall be determined and announced on a date certain prior to the holding of the referendum.

O. Announcement of Referendum Results

3.46 Article 32 of the draft law provides that the Republic Commission shall establish and announce the results of a Republic Referendum. The municipal commission shall establish and announce the results of a Municipal Referendum. Results of a referendum shall be published in the appropriate Official Gazette of the Republic of Montenegro, no later than 15 days after the date of holding the referendum.

P. Citizenship Requirements for Voting in Referendum Elections

3.47 Montenegro adopted a new Citizenship Law in 1999. The new Citizenship Law increases the number of years of residency needed in Montenegro to establish citizenship. The Citizenship Law impacts upon electoral matters as Article 32 of the Constitution of Montenegro conditions the right to vote on citizenship. This citizenship requirement for voting is stated in Article 11 of the Election Law and referenced in Articles 1, 3, and 5 of the draft law as well. Thus, the legitimate concern exists that a person who has voted previously may be denied the right to vote in a referendum due to the change in the Citizenship Law.

3.48 Article 109 of the Constitution of the Republic of Montenegro and Article 117 of the Federal Constitution provide that a law may not have a retroactive effect, except where required by the public interest, as prescribed when adopted. Thus, application of the Citizenship Law could raise a constitutional issue if it results in the revocation of voting rights previously exercised by a person.

3.49 **It is recommended** that the draft law, Election Law, and Voter Register Law be amended to provide that no person *previously entered on a voter register* shall be deleted because the person's citizenship status has changed, and that no person who has previously voted shall be denied the right to vote in a referendum, *due to the adoption of the new Citizenship Law*. This recommendation is limited to a person previously registered who is subject to denial of the right to vote due *solely* to the adoption of the new Citizenship Law.

Q. Residency Requirements for Voting in Referendum Elections

3.50 The Election Law establishes two residency requirements before the right to vote can be acquired. The first residency requirement, a general residency requirement for both parliamentary and municipal elections, is 24 months residency in the Republic of Montenegro. An additional, special residency requirement, for municipal elections, is 12 months residency in the respective municipal constituency. These requirements impact the draft law in that Article 5 of the draft law stipulates that citizens with the right to vote in conformity with the election regulations shall be entitled to vote in the referendum.

3.51 The special residency requirement of 12 months in the respective municipal constituency, in order to vote in municipal elections for that constituency, including a Municipal Referendum, is reasonable and acceptable.

3.52 The general requirement of 24 months residency in Montenegro, in order to vote in any election, is troublesome. A citizen of Montenegro, residing in Montenegro, should not be required to establish 24 months of residency in order to vote in national elections. This matter is further complicated by the fact that prior law required only 12 months residency to vote in any election. Thus, the problem is created, not unlike the problem with the Citizenship Law changes, that a person who has voted previously may be denied the right to vote in a referendum due to the increase in the general residency requirement from 12 months to 24 months. Article 109 of the Constitution of the Republic of Montenegro provides that a law may not have a retroactive effect, except where required by the public interest, as prescribed when adopted. Thus, application of the 24 months residency requirement could raise a constitutional issue if it results in the revocation of voting rights previously exercised by a person.

3.53 No person, who has previously voted, should be denied the right to vote due to the extension of the general residency requirement from 12 months to 24 months.

IV. CONCLUSION

4.1 The draft law fails adequately to: (1) ensure transparency in the counting and tabulation of the voting results of a referendum election, and (2) provide for election observation in a referendum election.

4.2 Provisions in the draft law regulating the voting processes could be improved.