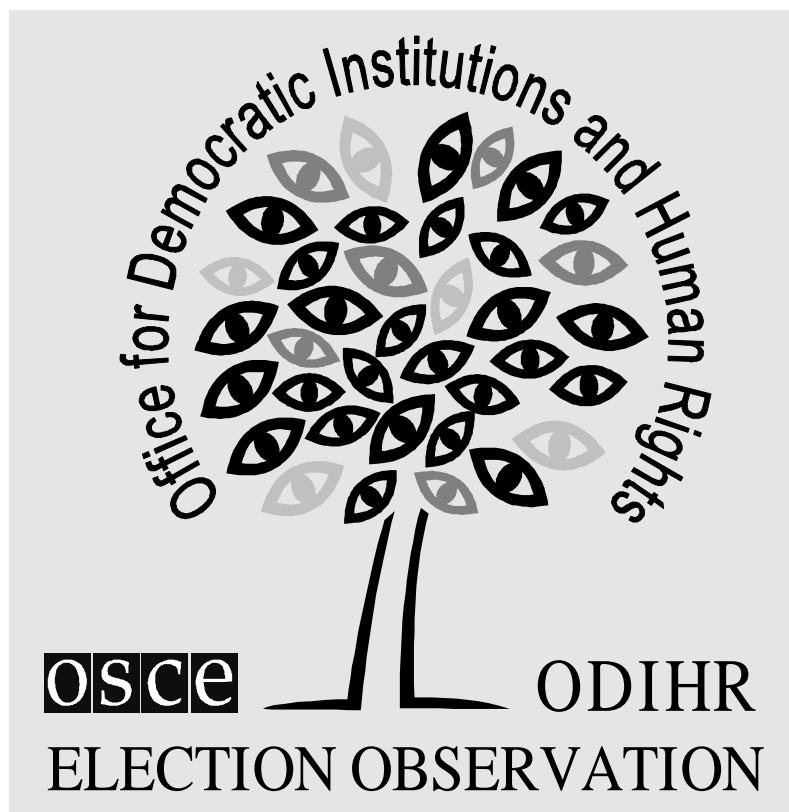




Office for Democratic Institutions and Human Rights

**ASSESSMENT OF ELECTION LEGISLATION
IN THE FEDERAL REPUBLIC OF YUGOSLAVIA
AND SERBIA**



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ASSESSMENT OF ELECTION LEGISLATION IN THE FEDERAL REPUBLIC OF YUGOSLAVIA AND SERBIA

I. INTRODUCTION

1. This report provides a brief assessment of the election legislation governing the forthcoming local and federal elections in Serbia and the FRY. It seeks to identify conflicts between the content of the legislation and best practice, appropriate international standards and OSCE commitments. It focuses on those particular areas of the legislation which may raise the risk of fraud or malpractice.
2. The laws reviewed are those relating to presidential elections, elections of deputies to the Chamber of Citizens (the lower chamber of the federal parliament), elections of deputies to the Chamber of Republics (the upper chamber in the federal parliament) and elections of members of municipal assemblies in Serbia. The presidential election law was adopted on 24 July 2000 following amendments to the Constitution which allow for the direct election of the federal president. The president was previously elected by parliament, the Federal Assembly. The review of the Law on elections to the lower chamber takes into account the amendments introduced into that Law in July 2000.
3. The author, Joseph Middleton, a prominent independent election expert and consultant, barrister, was commissioned to prepare these comments for the Office for Democratic Institutions and Human Rights (ODIHR) of the OSCE. He has previously worked on elections and election legislation in Albania, Armenia, Azerbaijan, Bosnia, Chechnia, Croatia, Georgia, the Russian Federation, Tajikistan, Turkmenistan, Ukraine, the United Kingdom and Uzbekistan.
4. The report relies on unofficial English translations of the relevant texts. The report does not take into consideration any regulation issued by the election commissions to implement the laws reviewed herein. ODIHR was refused entry visas for an assessment mission to examine the pre-election conditions, including the legal framework.

II. SUMMARY OF CONCERNS

5. The presidential election law is very brief. Too much is either left to be regulated by the other federal election laws or is not regulated at all. The effect of this excessive conciseness is that the Law lends itself to arbitrary application.
6. The other three laws (on elections to the two chambers of the federal parliament and to municipal assemblies in Serbia) adopt similar approaches and broadly similar rules on the organisation and conduct of the elections. These laws all raise serious concerns, of which the following are the most important.
 - i) Far too little provision is made to promote transparency in the organisation and conduct of the elections. There is no adequate provision to ensure effective monitoring by the mass media. There are no provisions for election observers. The scope for abuse is therefore considerable.

- ii) The rules on the formation of electoral commissions at all levels effectively hand control of these bodies to the political party with a majority in the Federal Assembly. Coupled with the low standard of transparency and accountability in the work of the electoral commissions, this amounts to a fundamental and very serious flaw in the legislation governing all four elections.
 - iii) There are no provisions to ensure a fair hearing and an effective remedy where a voter seeks to challenge unlawful acts or omissions of electoral commissions.
 - iv) There is inadequate provision to ensure a level playing field for participants in the election campaign.
7. As a result of these concerns, the legislation governing the forthcoming elections does not accord with international standards in significant respects, or with OSCE commitments.

III. LAW OF FRY ON PRESIDENTIAL ELECTIONS

8. The new Law on the Election and Termination of Mandate of the Federal President is a remarkably brief document of just 24 articles. This is explained by the fact that all issues not regulated by this Law are governed by the Law on Elections to the Chamber of Citizens.¹ Such issues include the powers and functions of electoral commissions, rules on the conduct and financing of the campaign, and voting and counting procedures.
9. Whilst there is some benefit in avoiding duplication, the brevity of the Law is excessive. It leaves too many areas of the electoral process which are not well-defined and are therefore susceptible to arbitrary or biased application.
10. The Federal Electoral Commission (FEC) may be expanded by up to eight representatives of groups nominating presidential candidates who have collected the highest number of voter signatures.² Whilst this measure tends to promote transparency and accountability, it lacks clarity and detail. It does not indicate what voting powers these members are to have, nor does it stipulate a deadline by which they must be admitted to the work of the FEC. Nor does the Law set out the important rights of such members to be notified in advance of FEC sessions, to be provided with access to election materials and documents, including materials from subordinate commissions, to participate in FEC sessions and to lodge dissenting opinions. In the absence of such details in the Law there is a danger that procedures may be manipulated in an arbitrary fashion for political motives.
11. A candidate is nominated “by a political party, another political organisation, or a group of citizens after collecting at least 25,000 voter signatures”.³ This fundamentally important article is excessively concise, as it leaves too many unanswered questions. What is a political organisation? Must it be registered? Must it have a charter that includes participation in elections as one of its activities? Must a party or political organisation be registered at the *federal* level? If registration is a pre-requisite, how long

¹ Articles 5 and 22

² Article 5

³ Article 3

does either a party or political organisation have to have been registered? Another very important issue is the verification of signatures. The FEC will have to carry out some degree of verification of signature lists, but fairness dictates that all lists must be subjected to the same kind and degree of verification. The absence of all these criteria leaves excessive scope for arbitrary interpretations and a real danger of partisan manipulation.

12. There are other unsatisfactory aspects of the registration process. Article 6 sets a deadline for nominations of 20 days prior to polling day. Given that the FEC has a further five days to finalise the list of candidates, this leaves far too little time for the campaign. Also, the Law fails to ensure that candidates seeking registration are given an opportunity to correct any errors or defects in their nomination papers. This is another reason why the 20 day limit is too short.
13. The Law makes no provision to protect presidential candidates during the campaign. Candidates should enjoy some form of immunity from arrest and prosecution during the campaign period.

IV. LAW OF FRY ON ELECTIONS TO CHAMBER OF CITIZENS

A. THE FEDERAL ASSEMBLY

14. The Federal Assembly (parliament) of the FRY comprises two chambers. The Chamber of Citizens comprises 138 deputies. The Chamber of Republics comprises 20 deputies from each of the two republics in the federation.

B. ELECTORAL SYSTEM

15. The systems of Proportional Representation (PR) adopted is the d'Hondt model.⁴ This method is employed in a number of established democracies, such as Belgium. This particular model of PR has the general effect of favouring a party with a large majority at the expense of smaller parties.⁵ This is therefore an important consideration when assessing the overall effect of the election legislation.
16. The Copenhagen Document includes an express commitment to allow citizens to seek political office as representatives of political parties or individually.⁶ However, the effect of Article 39 (as amended) is that, where there are more than two mandates in a single electoral unit (which is the case throughout Serbia, where 108 deputies are elected from 26 electoral units),⁷ an independent candidate will not be permitted to register a one-candidate list. In this respect the Law presents a direct violation of this OSCE commitment.

⁴ For a brief guide, see "Electoral Systems: A world-wide comparative study", Inter-Parliamentary Union, 1993, p. 3.

⁵ *ibid*, p. 11

⁶ Paragraph 7.5

⁷ See the Law on Electoral Units.

C. ELECTION ADMINISTRATION

17. Elections to the Chamber of Citizens are administered by the Federal Electoral Commission (FEC), an electoral unit commission for each electoral unit (EUC), and a polling board (PB) for each polling station. The nine permanent members of the FEC are appointed by the Federal Assembly. In addition, up to eight members of the extended composition are nominated by those who submit electoral lists (“electoral list submitters”) provided that they meet certain qualifications. The FEC appoints the EUCs along similar lines, which in turn appoint the PBs.
18. It is alarming to see that the rules on the formation of electoral commissions at all levels (FEC, EUCs, PBs) seem to make no provision whatsoever to ensure political plurality within the permanent membership. Moreover, given the number of extended composition members, where a particular party has a majority in the Federal Assembly, that party can effectively ensure that it controls all decisions taken by all electoral commissions. In the light of the generally low standard of accountability and transparency in the work of the various election commissions (see below), this raises obvious and very serious concerns about the impartiality of their work. However justified such concerns might or might not be, they are likely to undermine public confidence in the administration of the elections and the results which they produce.
19. All members of electoral commissions must be guaranteed the opportunity to participate in full in the administration of the election. Such guarantees are particularly important for members appointed in the extended composition of such bodies. In order to provide such guarantees the Law should stipulate the right of all members to be notified in good time of sessions, to be provided with full access to election documentation, to attend, participate in and vote at all sessions, and to submit dissenting opinions or complaints and appeals to superior commissions. Apart from a rule allowing access to materials in the Chamber of Citizens Law,⁸ none of these rights are protected in the Law.
20. It is not clear in the translation provided when the members of the extended composition begin their work. Moreover, the Law does not indicate which of the functions entrusted to the FEC and EUCs are to be discharged by the full, extended composition.
21. The structure and powers of election commissions fail to secure transparency and accountability of the process. The laws mandate the FEC to appoint two types of EUCs: (1) one EUC for the Chamber of Republics (EUC/CR) election in each Republic; and (2) one EUC for the Chamber of Citizens (EUC/CC) election in each of the 26 constituencies. Both EUC/CRs and EUC/CCs are entitled to appoint members of the same 10,000 PBs in Serbia and 1,050 PBs in Montenegro. For the Federal Parliament elections, the PBs report the appropriate voting results directly to EUC/CRs and EUC/CCs. The law fails to provide a procedure for reporting the results of the presidential vote. For the municipal elections, the PBs report the results to their respective Municipal Electoral Commissions (MEC), but the MECs have no other powers over PBs. Thus the reporting lines for results render monitoring the tabulation of results extremely difficult, if not impossible.

⁸ Article 64

D. APPEALS AND COMPLAINTS

22. It is essential that citizens are provided with prompt and effective remedies where they wish to appeal against the unlawful conduct of election administrators. In many cases such remedies will not be available under the present Law.
23. The Law should protect the right of a voter to a fair hearing in a court of law as a means of obtaining an effective remedy. It does not appear to do so. Thus a voter who believes his/her rights have been violated by a PB must appeal first to the EUC and await its decision. If dissatisfied with that decision, s/he must appeal next to the FEC and await its decision. There are no guarantees of a fair hearing at any stage of this process. Only when the FEC has ruled on the complaint can the voter appeal to a court, in this case the Federal Constitutional Court. There is no deadline by which the court must decide the complaint. Inevitably this entire process raises an obvious risk of the denial of justice. If voters are to have an effective remedy determined by a court which will ensure a fair hearing, they must be permitted to apply directly to a court.
24. There may be cases where a refusal to register a candidate list is successfully appealed, whether to the FEC or to a court. One of the consequences under the present Law is that the electoral list submitter may be unfairly prevented from having a representative in the extended commission. This provides a further argument for ensuring that complaints can be made immediately and directly to a court without having to exhaust all appeals within the system of electoral commissions.

E. VOTER REGISTER

25. The Law does not appear to indicate who is responsible for maintaining the voter register. Nor does it identify the forms of identification which will suffice to prove the right to vote. The register is required to be made available for inspection within three days of calling the election, but there is no rule for its public display in public places. This is likely to hinder full and free access to the register.
26. Nor does the Law deal adequately with cases where a citizen wishes to dispute an entry or omission on the register. It sets out an appeal procedure which relies on the (unidentified) body charged with keeping the register to refer the matter to a court competent to deal with administrative disputes. The citizen seems to have no right to address a court directly, even if the said body refuses or fails to refer the matter to a court. This arrangement is clearly incompatible with international standards in so far as they entitle a citizen to enforce and protect his fundamental rights in a court of law.

F. REGISTRATION OF CANDIDATE LISTS

27. Electoral lists must be supported by 1,000 or 2,500 signatures, depending on the size of the electoral unit. Although the Law ensures that electoral list submitters have an opportunity to correct defects in the lists and other parts of the application for registration, it fails to indicate how signature lists will be verified. It is possible to submit signature lists to varying degrees of scrutiny, from checking for errors on the face of the document (e.g. counting the number of signatures or ensuring that the voter's details appear next to the signature) to checking with voters to confirm that they did sign the list. The inclusion in the Law of criteria for checking signature lists would not only provide a uniform

system of scrutiny for all parties and lists; it would also avoid the use of arbitrary criteria as a means of excluding a particular list.

G. TRANSPARENCY

28. There is remarkably little provision in this Law to promote transparency in the organisation and conduct of the elections. There are no provisions whatsoever for either domestic or international election observers. There are no rules to ensure that representatives of the mass media can be present and monitor and report on the opening of polling stations, the conduct of the election and the processing of results.
29. The use of extended composition electoral commissions does of course lend a degree of transparency to the administration of the elections. However, as already noted, the present arrangements effectively ensure that the party in power can control electoral commissions if it so wishes.
30. Article 28 of the Law provides that the work of electoral commissions shall be public, but in the absence of any detail as to what this entails, it is impossible to say that this provision lends transparency to the work of the commissions.
31. The mechanism of election result reporting by various types of election commissions fails to secure transparency and accountability of the process. See comments in paragraph 21.
32. A significant improvement towards better transparency was provided in the recent amendments to the Law. These included an amendment to Article 83 which now provides that copies of the PB results will be posted at the polling station and distributed to the representatives of the electoral list submitters in that voting unit. However, this does not extend the results as processed at the EUC, whose activities therefore remain largely unaccountable. Nor is the FEC obliged to publish the results of the election in sufficient detail to allow effective cross-checking of results.

H. CAMPAIGN: MEDIA

33. Article 52 imposes a duty on editors and broadcasters to present all candidates in an independent and objective manner. This obligation does not extend to political parties. The Law should include an express prohibition on the use of state media to campaign for or against any candidate.
34. Article 53 provides that state broadcasting media shall reach agreement with political parties on the number and duration of campaign broadcasts. It is difficult to see how this process can be achieved absent any guidelines or requirements on how broadcasts should be allocated. The Law does not indicate what steps a political party can take by way of appealing the broadcasters' decisions on the allocation of air space.

I. CAMPAIGN: FINANCE

35. It is not clear how financing of the campaign will work under this Law. Article 108 provides that funds for the participation of electoral list submitters in the election campaign shall be distributed according to standards determined by the FEC. The rules and principles by which funds are distributed are too important to be left to the FEC,

particularly when that body is likely to be dominated by the party in power. The position is further complicated by the revised text of Article 7, which provides that funds are distributed to electoral list submitters “in proportion to the number of received mandates”. If this translation is correct, it is not obvious how it would apply during campaign period, when no mandates have been received.

36. The Law also makes no attempt to impose limits on spending by political parties or to require them to account for their campaign spending after the election. This is despite a provision in the federal Constitution which requires the sources of revenue of political parties to be open to public scrutiny.

J. VOTING AND COUNTING PROCEDURES

37. The recent amendments to the Law provide that ballot papers must be printed on watermarked paper. This goes some way to enhancing the security of the ballot. However, voters are not required to sign the registers when receiving ballots, which is a useful procedure to control voter turnout.
38. Persons doing military service and soldiers on military exercise are permitted to vote in military units. It is highly undesirable that the armed forces conduct their own voting outside the ordinary system and beyond civilian supervision. If soldiers are permitted to vote in an extra-ordinary procedure, they should do so using the ordinary postal vote, which does not involve the handling of the ballot envelope by other persons before it is despatched for counting.
39. The Law creates wholly avoidable problems by setting a late deadline for the arrival of postal ballots a full day after the close of voting.⁹ This deadline operates where voters are at a great distance from polling boards. If distances create a problem with postal voting, this system should not be used. If it is used, a simple single deadline should apply for all voters. If postal voters can be expected to have their ballots delivered the day after polling, there is no reason not to set the deadline a day earlier. As it stands, the present arrangement raises obvious risks that postal ballots may be used as a means of manipulating the results after the ballots cast on polling day have been counted.
40. Article 75 permits members of the PB to visit a person who is unable through ill health to attend the polling station in person. The voter completes a ballot and places it in an envelope which is sealed in the voter’s presence. However, this procedure requires further safeguards to protect the voter from undue influence and maintain the secrecy of the ballot. As indicated above, there is no scope for observers or representatives of the mass media to monitor this process. At the very least the Law should seek to ensure that representatives of more than one party are engaged in taking the ballot papers to the voters.
41. It is difficult to see why the PB would need 18 hours from the close of polling to count the ballot papers.¹⁰ Its results should be processed and delivered to the EUC much earlier.

⁹ Article 81

¹⁰ Article 84

V. LAW OF FRY ON ELECTIONS TO CHAMBER OF REPUBLICS

42. Like their colleagues in the Chamber of Citizens, deputies in the Chamber of Republics are elected according to party lists and lists proposed by citizen groups.
43. In all key respects the Law on Elections to the Chamber of Republics reproduces the rules contained in the Law on Elections to the Chamber of Citizens as recently amended. The concerns identified above therefore apply equally to this Law.

VI. LAW OF THE REPUBLIC OF SERBIA ON LOCAL SELF-GOVERNMENT

44. Local self-government in Serbia is effected by municipal assemblies. Provision for the election of assembly members (councillors) is made in Articles 120 to 172 of the Law of the Republic of Serbia on Local Self-Government.

A. SUFFRAGE

45. Article 122 imposes a pre-requisite that voters must be citizens of Serbia. However, there appears to be no definition in law of Serbian citizenship. The federal citizenship law provides little by way of clarification. This situation creates an obvious danger that the absence of such a definition may be used to prevent a person from voting on arbitrary or spurious grounds.

B. MUNICIPAL CONSTITUENCIES

46. Under Article 124 municipal constituencies are defined by the existing municipal assembly. The Law fails to indicate the principles by which this process should operate. In doing so, it makes it more difficult to challenge these decisions, e.g. to prevent gerrymandering. Nor does the Law specify a deadline by which constituencies must be defined. This means that decisions may be taken so late that no effective challenges could be mounted before the nomination and campaign procedures begin.
47. This Article also fails to stipulate a maximum percentage deviation from the norm for the size of constituencies. Again, this lack of definition opens the possibility of abuse for political purposes.

C. ELECTION ADMINISTRATION

48. The elections are administered by an electoral commission set up for each municipality (the Municipal Electoral Commission, or MEC) and polling boards set up for each polling station (PBs). The rules for the formation of these bodies are very similar to those arising under the laws governing elections to the Chamber of Citizens. The concerns identified above at paragraphs 18-20 above apply equally in relation to the present Law.
49. It should be noted that for the joint federal and local elections on 24 September 2000 the PBs will be formed in accordance with the procedure for the federal elections.¹¹

¹¹ Article 131

50. A further defect in the Law is the failure to ensure that members of the extended composition play a full role at an early stage. These members can be appointed at a very late stage in the organisation of the elections. Moreover, the Law fails to identify which of the MEC's tasks are performed by the extended commission.¹² This may further undermine the role played by the members of the extended commission.
51. A candidate's nominator must appoint his representative to the MEC within 24 hours of being forwarded a decision confirming that he is entitled to make such an appointment.¹³ This rule could operate unfairly for candidates who do not receive such a decision. The deadline should therefore run from the moment the decision is received by the candidate.
52. Complaints about election administration, whether at the PB or MEC level, are made to the MEC; direct complaints to the PB do not seem to be permitted. The MEC must make a decision within 48 hours.¹⁴ Clearly this deadline is wholly inappropriate if an issue arises on shortly before or on election day, in which case a decision needs to be made within hours or immediately if it is to have any effect.
53. A complaint about the election administration cannot be made directly to a court but must be made first to the MEC. This seems to contradict the commitment in the Serbian Constitution to the judicial protection of fundamental rights, particularly where the MEC simply refuses to adopt a decision on the complaint. Moreover, a judicial appeal lies only to the lowest level court, the municipal court. The Law expressly prohibits appeals against that court's decision. Such rules clearly violate international standards for access to a fair hearing and the right of appeal against the court of first instance.

D. TRANSPARENCY

54. This Law provides far too few guarantees of openness and transparency in the conduct of elections. There is no provision for election observers. As noted above, candidate representatives on MECs and PBs are not accorded full and clear rights to participate in and monitor the administration of the elections. There appear to be no provisions whatsoever for results to be announced at the polling stations or for copies of result protocols to be displayed and made immediately available.
55. There are further concerns about the security of the ballot. Election materials need to be taken directly from the polling station to the MEC as soon as the counting and recording process is completed. Not only does the Law fail to impose a corresponding obligation on the PB; Article 145 actually allows 18 hours from the closure of the polling station for the voting materials to be delivered to the MEC. Such drafting raises serious risks of interference with the voting materials and the election result. The 48 hours allowed to MECs to finalise the results also appears to be too long.

¹² Article 131

¹³ Article 130

¹⁴ Article 155

E. OTHER ISSUES

56. Responsibility for maintaining order at the polling station lies with the PB.¹⁵ However, the Law appears to make no provision for the exclusion of unauthorised persons from the polling station. Such a rule is essential to the independent and autonomous operation of the PBs and its absence runs counter to the recognition of such qualities in Article 127 of the Law.
57. Repeat elections are to be held if the election is annulled due to irregularities. The MEC and municipal court considering such a decision requires much clearer guidance on the basis on which elections can be annulled. Irregularities of some kind are inevitable in any election. Most will have no substantial consequence for the election result. Annulment is an extreme measure and should result only from those irregularities which have or demonstrably may have affected the outcome of the election. Otherwise these procedures can be abused to annul an election which has simply produced the “wrong” result.

¹⁵ Article 133