



Office for Democratic Institutions and Human Rights

**REPUBLIC OF MONTENEGRO
FEDERAL REPUBLIC OF YUGOSLAVIA**

**OSCE/ODIHR ASSESSMENT OF AMENDMENTS
TO THE LEGISLATIVE FRAMEWORK FOR
ELECTIONS**



Warsaw
9 August 2002

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	EXECUTIVE SUMMARY.....	1
III.	PREVIOUS OSCE/ODIHR RECOMMENDATIONS	2
A.	ELECTION LEGISLATION.....	2
B.	MEDIA ISSUES	4
IV.	APPLICATION OF AMENDMENTS	4
V.	AMENDMENTS TO THE ELECTION LAW	5
A.	TECHNICAL IMPROVEMENTS	5
B.	SET ASIDE SEATS	5
C.	ELECTION ADMINISTRATION.....	6
D.	CANDIDATE REGISTRATION.....	6
E.	VOTING PROCESS	7
F.	TRANSITIONAL PROVISIONS	8
VI.	AMENDMENTS TO THE MEDIA LEGISLATION.....	8
VII.	CONCLUSIONS.....	10

**OSCE/ODIHR ASSESSMENT OF AMENDMENTS TO THE LEGISLATIVE
FRAMEWORK FOR ELECTIONS IN THE REPUBLIC OF
MONTENEGRO/FEDERAL REPUBLIC OF YUGOSLAVIA
Warsaw, 9 August 2002**

I. INTRODUCTION

This assessment reviews a set of legislation, amending the legal framework for elections and related media legislation, adopted on 18 July 2002 by the Republican Assembly (the Parliament) of the Republic of Montenegro/FRY, returned by the President to the Parliament without signature on 25 July, adopted again by the Parliament on 29 July, and finally signed into law by the President on 30 July.

The legislation reviewed includes the Act on Changes and Amendments to the Law on Election of Councilors and Representatives (the act on amendments to the election law), the Law on Presentation of Submitters of Electoral Lists Through Electronic and Print Media, State or Privately Owned in the Period from Calling for Elections to the Commencement of Electoral Silence (the law on media presentation of the electoral campaign), and the Law on Changes and Amendments to the Public Information Act.¹

The amendments to the legislative framework for elections were rushed through Parliament without broad consultation with the parliamentary political parties. As a result, a muddled environment for elections has ensued. Acrimonious disputes have followed as to which laws apply to the 6 October 2002 early parliamentary elections and municipal by-elections in Podgorica and Tivat. In addition, the impasse on the appointment of the members of the Constitutional Court must be resolved urgently. Broad consultations on this issue will help to resolve it. In view of the role of the Constitutional Court in the election context, it is important that it be perceived as politically neutral. Thus, the current political crisis can result in highly disputed elections, the further polarization of Montenegro's electorate, additional repeat elections, and further impasses in the months ahead.

II. EXECUTIVE SUMMARY

Reviewing Montenegro's election legislation in the context of election observation missions, the OSCE/ODIHR had found this legislative framework generally adequate for democratic elections, though shortcomings were also identified. Significant recommendations for improvement of the electoral legislation were made after recent OSCE/ODIHR election observation missions. As such, the effort by the Parliament to implement some of the OSCE/ODIHR recommendations is welcomed and some of the amendments are constructive. However, the amendments do not address the most important shortcomings identified, and introduce other changes that are not compatible with international standards.

The legislation proposing to further regulate media activities is troublesome, while the motives prompting the proposed amendments are valid as already detailed in recent

¹ This assessment is based on an unofficial translation of the legislation. Any legal review based on translated laws may be affected by issues of interpretation resulting from translation.

OSCE/ODIHR observation reports. The penalty provisions may undermine due process considerations. Other provisions introduced in the amended legislation may inevitably stifle the campaign environment by micromanaging every minute detail of media conduct. In addition, some of the amendments regulate private media in a manner not compatible with international standards.

Regardless of the substance of the amendments and in accordance with established standards, the 6 October 2002 elections can only take place under the laws in force at the time the elections were announced. The amended laws can only apply to elections called after the prescribed number of days elapses following the publication of the new legislation in the Official Gazette.

Nonetheless, the applicable legislation for the 6 October 2002 elections could be amended with some technical elaborations where the law requires clarification. Further improvements in the legislative framework for the 6 October elections are also possible through sub-legislative regulations. Moreover, if a broad consensus is reached among all parties in the Parliament, a limited number of provisions of the Law on Election of Councilors and Representatives (the election law) may be possible to amend in the “public interest”, in accordance with the second clause of Article 109 of the Montenegrin Constitution, retroactively applying to the 6 October elections. Such an “exceptional” measure could be in the “public interest” in that it would avoid a chaotic situation in the months ahead.

III. PREVIOUS OSCE/ODIHR RECOMMENDATIONS

A. ELECTION LEGISLATION

While the OSCE/ODIHR has concluded that the past two Montenegrin elections were conducted in general accordance with international commitments and standards, and that the existing legislation was adequate for democratic elections, the following recommendations were proposed to improve the legislative framework for elections:

- The election law should be amended to reflect ownership of mandates by elected councilors. In particular, councilors should not forfeit seats due to a change in political affiliation.
- Provisions that grant political parties the power to name half of candidates disregarding their position on candidate lists should be amended. The law should require that seats be awarded solely in the order in which they appear on the electoral lists.
- Provisions outlining the status of independent councilors, and the status of councilors in the event that a coalition or party dissolves, should be incorporated into the law.
- The mandate of the Republican Election Commission (REC) should be expanded to guarantee that it co-ordinates 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. The REC should be also mandated to adopt rules of procedures for its meetings.

- The rights and duties of all members of the REC, Municipal Election Commissions (MEC) and Polling Boards (PB) should be more clearly defined, including the rights to raise matters for discussion, call for a vote, and receive advance notice of meetings. The election law should accord equal status to the permanent and extended members of commissions and PBs.
- The terms of office of permanent MEC members should be respected without premature termination on the basis of political shifts in Municipal Councils.
- The current system for accommodating the interests of minorities should be re-evaluated to determine its effectiveness. Refinements or alternative approaches might be better suited to achieve the intended purpose, to avoid potential anomalies inherent in the current system, and to extend similar advantages to other minorities.²
- Rules for establishing the 3% threshold and the system for the allocation of five seats elected from special polling stations should be more clearly detailed in the law. The 3% threshold should be calculated with relation to the total number of valid votes cast.
- New provisions should be enacted to more clearly define coalitions, the rights or restrictions on coalition partners during the campaign period, their funding and access to the media.
- Provisions should also be enacted to define circumstances under which a coalition ceases to exist, and the official manner in which such a decision is to be reported.
- The law should prohibit the use of government-owned buildings by political parties.
- Undue pressure or influence on government employees must be prohibited by law.
- A code of conduct for police officers during the campaign period should be clearly defined and enforced.
- A separation of government and political party activities should be strictly enforced. Activities or programs that blur the distinction between official and political sponsorship should be restricted by law.
- The grounds for repeat elections should be reviewed to determine the serious violations for which the poll will be repeated in individual polling stations.

² See also the OSCE/ODIHR Guidelines on Participation of National Minorities in the Electoral Process, Warsaw, 2000.

- Voters must be required to sign the voter register instead of a separate Book of Electors, which is redundant.

B. MEDIA ISSUES

The OSCE/ODIHR has also criticized bias in the State media and urged better mechanisms to bring the media into compliance with more democratic practices, at the same time stating that voters in Montenegro receive a wealth of information from a variety of sources in order to make an informed choice during elections. A number of recommendations was made, including:

- The adoption of standing rules on the media during the electoral process to ensure a timely start to the campaign. Such rules should regulate the role and the conduct of the media but should not restrict political discourse and debate.
- Campaign material, and campaign advertising in newspapers and on electronic media, should fully disclose the sponsor, individual or party that has paid for and placed the advertisements.
- Failure by the media to clearly designate paid political advertisements as required by the law should be subject to sanction.

IV. APPLICATION OF AMENDMENTS

The 6 October 2002 parliamentary elections were called by the President and signed into law on 20 July. On 18 July, the Parliament had adopted a decision on shortening its term-of-office, in essence dissolving itself. This decision was adopted after adopting the amendments changing the election and media laws, but before the amendment process was completed and the amendments were signed into law. The Parliament's decision to shorten its term-of-office was published in the Gazette on 19 July.

Although the amendments to the legislative framework for elections were adopted in the Parliament on 18 July, they were not signed into law by the President and were returned to the Parliament on 25 July. The Parliament adopted again the same laws on 29 July and the President signed the same on 30 July. The laws will come into force on 10 August, 21 days after the 6 October parliamentary elections were called.³

Based on Article 109 of the Montenegrin Constitution and the international standard of *lex retro non agit*, the 6 October elections can only take place under the laws that were in force when the elections were called, that is the laws without the recent amendments.⁴ The amended laws, as now duly signed by the President and published in the Official Gazette, would apply to any elections called after 10 August.

³ Municipal by-elections in Podgorica were called on 3 July and in Tivat on 30 July.

⁴ "Statutes, other laws and general enactments may not have a retroactive effect. Exceptionally, only certain provisions of statutes, if so required by the public interest, as prescribed when they were adopted, may have a retroactive effect." (Art. 109)

Furthermore, the Council of Europe Venice Commission has admonished that election laws, in particular fundamental elements of such laws, must be stable and not subject to changes within a year of an election.⁵ However, in extraordinary circumstances, some amendments to the election law could be justifiably introduced after the announcement of elections provided that these (1) do not change the electoral system, (2) clarify ambiguity in the legislation, and (3) are accepted by all participants of the electoral process.

V. AMENDMENTS TO THE ELECTION LAW

The Parliament's effort to improve the legislative framework for elections in Montenegro and to implement some of the recommendations of the OSCE/ODIHR is welcomed. Some of the amendments adopted in July are indeed constructive and the motives for the proposed changes are worth serious consideration. However, other amendments are flawed, in particular provisions relating to the voting process and the appointment of election commissions.

Moreover, the amendments do not address the most important shortcomings in the legislative framework for elections identified by the OSCE/ODIHR during recent election observation missions.

A. TECHNICAL IMPROVEMENTS

The majority of the 2002 amendments to the election law are of a technical nature. Among others, the campaign silence period was reduced from 48 to 24 hours before election day (Art. 6) and the timeframe between the calling of elections and election day was changed from 60-100 days to 60-80 days (Art 14). The **OSCE/ODIHR supports** these amendments to Article 6 and Article 14.

B. SET ASIDE SEATS

Article 12 of the election law was amended to reduce the number of MPs elected in specially designated polling stations (in Albanian communities) from 5 to 4.⁶ As Article 3 of the election law states that each representative of the Montenegrin Parliament shall represent 6,000 voters, the decrease in the number of Albanian MPs must relate to the size of the Albanian minority electorate, and must be established through a thorough examination of available demographic data. Additionally, such a change should be adopted only after exhaustive consultations with the minority community leadership. As such, the **OSCE/ODIHR does not support** the amendment to Article 12 without exhaustive consultations on the subject.

⁵ See European Commission for Democracy Through Law (Venice Commission) "Guidelines on Elections", Venice, 4 July 2002.

⁶ The number of MPs elected (5) in the specially designated polling stations was previously regulated in Article 118 (Transitional Provisions).

Additionally, and in conformity with previous ODIHR recommendations, future electoral legislation needs to re-examine the system of accommodating the interests of minorities and extend these advantages to all minorities.

C. ELECTION ADMINISTRATION

The term of office of election commissions (Republican and municipal) was extended from four to five years (Art. 19). Such a change could contribute to a more stable election administration. However, the same article stipulates that the election commissions shall be appointed “after constitution of the newly elected Parliament”. As the term-of-office of the Parliament is 4 years, such provision contradicts the 5 years term of election commissions. The **OSCE/ODIHR would support** this amendment if the apparent contradiction and the manner of the appointment of election commissions are clarified in Article 19.

The amendment in Article 24 authorizing the Parliament to appoint a Municipal Election Commission (MEC) after the dissolution of a Municipal Assembly is troublesome. There is no safeguard to ensure that the composition of a MEC reconstituted by the Parliament reflects the local political balance. Moreover, the Parliament’s control over the administration of elections at the local level contradicts the spirit of local self-government. The **OSCE/ODIHR recommends** that the law be amended to ensure that when a Municipal Assembly is dissolved, a new Municipal Election Commission could be appointed by the Parliament only if the existing MEC fails to function under very narrowly detailed circumstances.

One of the new amendments (Article 18 of the act on amendments to the election law) authorizes the Parliament to appoint a new Republic Election Commission and a new Municipal Election Commission for Podgorica. This would change the election administration unjustifiably in the midst of the pre-election period before the 6 October elections. In addition, this provision contradicts the provision included in Article 19 of the election law. The **OSCE/ODIHR recommends** that this amendment be repealed.

D. CANDIDATE REGISTRATION

In order to register a list of candidates for parliamentary and local elections, the minimum number of candidates on a political party or coalition list was increased from 1/3 to 2/3 of the total number of elected seats (Article 39). This amendment is reasonable and could be acceptable. However, the law fails to allow citizens to seek office as independent candidates, which is contrary to Paragraph 7.5 of the 1990 Copenhagen Document.⁷ The **OSCE/ODIHR supports** this amendment but with the additional recommendation that the election law be further amended to permit citizens to seek office as individuals.

⁷ Paragraph 7.5 of the OSCE 1990 Copenhagen Document requires that citizens are permitted “to seek political or public office, individually or as representatives of political parties or organizations, without discrimination”.

E. VOTING PROCESS

Significant amendments were made in the voting process (Article 69), prohibiting polling board members “to announce in any form, and particularly by a loud addressing, the first and last names of voters, as well as their ordinal numbers on the voters’ register”. The OSCE/ODIHR is aware that the practice of party representatives making notes of voters who cast ballots is potentially subject to abuse. The **OSCE/ODIHR supports** this amendment.

A new Article 69a was added to ensure the secrecy of voting at polling stations. The amendment states that a polling station should be dissolved and the polling repeated if the polling board “fail to organize the polling station in the manner that provides for full secrecy of voting”. The **OSCE/ODIHR recommends** that the conditions for failure to “provide for full secrecy of voting” be clearly and narrowly defined, otherwise this amendment should be repealed because it could be subject to abuse.

In addition, the same article obliges the president of the polling board to invalidate a ballot if “a voter infringes the secrecy of voting by casting his vote in public, out of the area envisaged for voting or by showing his ballot paper in public to the polling board and making it visible who he/she has voted for”.

Such a provision gives excessive powers to polling board chairpersons to unilaterally cancel a ballot if the secrecy of voting has been violated regardless of the circumstances, in particular the intent of the voter. The **OSCE/ODIHR recommends** that part of this article be repealed and the secrecy of voting be promoted through (1) providing appropriate equipment for secret voting, (2) better training of polling board members, and (3) civic education efforts.

While amending Article 69 of the election law, the provision requiring a voter to sign the voter register to confirm the reception of a ballot was deleted. Such an amendment creates a significant loophole in the voting procedures as the polling board members will not be able to establish the total number of voters who voted at the polling station, which is a fundamental safeguard in ensuring the integrity of the electoral process. Moreover, the total number of voters who signed the register is needed for completion of the form for polling station results described in Article 89. What appears to be an omission, is later reinforced in Article 71a that prohibits polling board members to keep any record of voters who voted. The **OSCE/ODIHR recommends** that the amendment be repealed and the requirement that a voter sign the voter register to confirm reception of a ballot be reinstated.

A ban on the use of telephones and other communication devices in voting premises during polling activities and the vote count, introduced in Article 71a, is reasonable. **OSCE/ODIHR supports** this amendment.

Article 79 was changed to ensure that ballot boxes are not transparent. Although this type of ballot boxes promote increased transparency of the election process, in the Montenegrin context, the use of transparent boxes was criticized as violating the secrecy of the vote, in particular when ballots were not folded properly or were

printed on a thin paper. The **OSCE/ODIHR recommends** that the amendment be repealed and a new provision is introduced instead to require voters to place ballots in an envelope before placing in the ballot boxes. Alternatively, ballots could be printed on thicker paper stock.

F. TRANSITIONAL PROVISIONS

The amendments introduced a number of provisions (Articles 17-27 of the act of amendments to the election law) which appear to have a transitional character. As the act on amendments to the election law is silent on the transitional provisions existing in the election law before changes, it is unclear whether the transitional provisions from the election law before changes, including Article 120 regarding the use of UV light and transparent ink in “next parliamentary election” and Articles 120a and 121, referring to municipal elections in Podgorica and Herceg Novi on 11 June 2000, are still applicable. The **OSCE/ODIHR recommends** that the law clearly state which transitional provisions are applicable. In the circumstances of Montenegro where confidence in the electoral process is low, the provision for UV lamp and invisible ink must be reinstated.

VI. AMENDMENTS TO THE MEDIA LEGISLATION

Articles 50-64 of the election law that regulated the presentation of candidates in the media were deleted and a new law on media presentation of the election campaign was adopted. The new law appears to be an attempt to unify existing rules and procedures for media conduct during election campaigns. Moreover, the new law attempts to introduce additional rules and procedures, with the intention of establishing workable enforcement mechanisms. The motivation was to redress an excessive politicization of and State influence on the media.

In doing so, however, the Parliament appears to have opted for short-term solutions, rather than international standards and best practices as reflected in the Council of Europe-supported draft media legislation.

While it is clear that changes must be made to regulations pertaining to State media in order to ensure their political neutrality, in general, the changes to remedy media bias are flawed. The penalty provisions undermine due process considerations. Some provisions introduced in the amended legislation may inevitably stifle the campaign environment by micromanaging every minute detail of media conduct. Moreover, the new provisions attempt to regulate the activities of private media in the same breath as the State media. The distinction between State and private media is blurred.

Significantly, the new law seems to have been developed without any consultations with media representatives.

The new law on media presentation of the electoral campaign was based on a Resolution of Parliament on the Rules for Political Parties Presentation in Public Media Funded by State During the Election Campaign of 1998 and a Parliament

Decree on the Rule on Media Presentation of Submitters of Electoral Lists in the Election Campaign for the 2001 early parliamentary elections. These rules governed in detail the presentation of electoral campaign activities in the State-owned television, radio and *Pobjeda* daily, including the publication of statements, organization of press conferences, reporting from campaign rallies, etc.

A new provision in the new law stipulates that during election campaigns, media coverage of “political” activities of the State authorities (The President, Speaker of Parliament and Prime Minister) should be limited to one minute broadcast in the public electronic media or two columns in public print media (Article 2). Furthermore, “other state and governmental officials shall not be covered during election campaign”. Moreover, the same article introduces a ban on coverage of domestic activities of the government or municipal authorities after their resignation.

A ban on coverage of State authorities in the public media concerns also “opening of varied construction projects/facilities, roads, tunnels, bridges, placement of cornerstones, guest performances at the University of Montenegro, visits to health-care institutions, opening and visiting varied festivals, expositions, receptions organized to honor athletes, scholars/scientists, cultural and other workers, as well as opening of and attending varied sporting events, competitions etc.” (Article 3). Additionally, public media are not allowed to report on statements of gratitude to a State authority, high State or party official or a political party.

Another regulation obliges media reporting views of “independent, cultural and public personalities or NGO representatives ... to provide for the presence of another participant in the same program who shall represent the opposite views” (Article 4).

These articles introduce considerable limitations on the freedoms of expression, speech, and information, critical to an election campaign in a democratic society.

Articles 2, 3 and 4 are contrary to the 1990 OSCE Copenhagen Document, specifically Paragraph 7.7 which requires that the “law and public policy work to permit political campaigning to be conducted in a fair and free atmosphere in which neither administrative action, violence nor intimidation bars the parties and the candidates from freely presenting their views and qualifications, or prevents the voters from learning and discussing them....” These articles also violate the fundamental right enshrined in Article 19 of the Universal Declaration of Human Rights. Moreover, these articles possibly violate Article 35 of the Constitution of Montenegro, which provides that “Freedom of press and other public information media shall be guaranteed. Citizens shall have the right to express and publish their opinion in the public information media”, and Article 37 of the Constitution of Montenegro which prohibits censorship of the press and other public information media, and provides a long list of guarantees to preserve the freedom of expression. Similar guarantees are stated in Articles 35 through 39 of the Constitution of the Federal Republic of Yugoslavia.

The **OSCE/ODIHR recommends** that the Articles 2, 3 and 4 be repealed and the legislation expressly state that coverage of government officials and their activities, electoral contestants, and electoral events by State owned media be impartial and fair.

Article 12 prohibits electoral contestants to buy advertisements in the media for campaign purposes. Although there may be legitimate reasons to ban paid advertisement, such a provision may unreasonably limit the scope of electoral campaign and limit voter's access to information. While international standards may not be expressly contradicted, the **OSCE/ODIHR recommends** that the Article 12 prohibition be addressed in another manner. Paid political advertising could be permitted but it could be based on equal access and coverage. The law could require that the lowest commercial rate for such ads be offered to all electoral contestants. Paid political advertisements should carry the disclaimer language of "paid notice". The **OSCE/ODIHR recommends** that paid political ads be permitted, and the law be amended to require that the lowest commercial rate for paid political ads be offered to all electoral contestants and that all paid advertisement be clearly and without ambiguity identified as such.

Article 13 provides for the establishment of a multiparty Commission for Public Media Supervision by the Parliament to monitor public media performance during the election campaign. The article blurs the separation of powers by entrusting to a parliamentary body the implementation of legislation. The **OSCE/ODIHR does not support** the formulation in Article 13.

The new law on media presentation of the electoral campaign provides penalties for media and political parties which breach certain articles of the law (Articles 16-17). The penalty provisions may undermine due process considerations. The right to appeal is not foreseen in the procedures prescribed by the law. The **OSCE/ODIHR recommends** that these articles be repealed.

In summary, several provisions of the new law on media presentation of the electoral campaign are contrary to domestic law as well as international standards. The **OSCE/ODIHR recommends** that the law on media presentation of electoral campaign be repealed.

Instead, the **OSCE/ODIHR recommends** that, as an interim measure, new editors and editorial boards of the three State controlled media outlets – TV, Radio and *Pobjeda* - be appointed. These new editors and boards should be individuals who enjoy the confidence of the political parties in the Parliament. They should be appointed on the basis of consensus. In addition, the international community could be called upon to appoint advisors to assist the new editors.

VII. CONCLUSIONS

The concerns prompting some of the amendments to the legislative framework for elections in Montenegro are valid and should be heeded. The legislative framework for the 6 October elections and related media legislation could be supplemented with

properly and narrowly formulated regulations that do not contradict the election law. The **OSCE/ODIHR recommends** that consideration be given to the inclusion of some of the amendments introduced in July in the regulations to be issued by the REC, with possible assistance of the international community, for the 6 October elections.

Moreover, if a broad consensus could be reached among all parties represented in the Parliament, the second clause of Article 109 of the Montenegrin Constitution could be invoked to amend a limited number of provisions of the election law on an “exceptional basis” and in the “public interest”, thus making those retroactively applicable to the 6 October elections and possibly avoiding a chaotic situation in the months ahead.

The **OSCE/ODIHR recommends** that a compromise package of amendments to the election legislation and sub-legislative regulations be agreed and adopted by the Parliament harmonizing the currently in force and amended laws for elections. Such a package shall not be changed until the end of this year regardless of the outcome of the parliamentary elections, and shall remain in force for the parliamentary elections, the municipal by-elections in Podgorica and Tivat, the presidential election and all other possible elections that may be called this year.

Additionally, the entire legislative framework for elections should be reviewed thoroughly next year and, through multi-party discussions and consensus, the legislative framework could be further improved with a view to the creation of a more stable electoral framework.

Finally, the editors of the three State controlled media could be reconsidered and new personalities who enjoy the confidence of all could be appointed. It is important that all institutions of the State relevant to an election, such as State media and the Constitutional Court are seen to be politically neutral.