Office for Democratic Institutions and Human Rights

COMMENTS ON THE DRAFT "REFERENDUM LAW ON THE STATE STATUS OF THE REPUBLIC OF MONTENEGRO" FEDERAL REPUBLIC OF YUGOSLAVIA

Warsaw
5 November 2001

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COMMENTS ON DRAFT
"REFERENDUM LAW
ON THE STATE STATUS OF
THE REPUBLIC OF MONTENEGRO"
FEDERAL REPUBLIC OF YUGOSLAVIA
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I. INTRODUCTION

The Office for Democratic Institutions and Human Rights (ODIHR) of the Organisation for Security and Co-operation in Europe (OSCE) has been requested by the Speaker of the Parliament to review and provide comments on the draft "Referendum Law on the State Status of the Republic of Montenegro" of 10 October 2001. The law is a *lex specialis* including 17 clauses, and is additional to the Referendum Law adopted on 19 February 2001, which was reviewed in detail by ODIHR in the Assessment published on 6 July 2001 (annexed herewith). Article 16 of the Draft Referendum Law on the State Status of the Republic of Montenegro specifically incorporates the provisions of the "Referendum Law (Official Gazette number 9/2001)" to apply "to the issues which are not regulated by this Law." This review should accordingly be read in conjunction with the Assessment of 6 July.

ODIHR notes with concern that the recommendations of 6 July have not been taken into account in the drafting of the draft *lex specialis*. The ODIHR recommendations of 6 July remain fully applicable.

Articles in the Montenegrin Constitution addressing specifically referendums, the changing of the status of the Republic, and the calling of early parliamentary elections in certain circumstances of proposed constitutional amendment, appear to leave scope for different interpretations. Clarification by the Constitutional Court is recommended before any referendum is contemplated.

The assessment of 6 July recommended that some level of weighted or qualified majority for a referendum question to be approved is preferable to ensure acceptance of the result and the safeguarding of stability. The Referendum Law of 19 February contained provisions only for minimum turnout. The draft *lex specialis* contains no such minimum protective provisions, with the expressed intention of removing the incentive for boycott. The issue of an appropriate majority, however, is of crucial importance for both domestic and international confidence in any possible referendum process.

The draft *lex specialis* does not take account of previous ODIHR assessment and recommendations and is a retrogressive step for Montenegro.

II. COMMENTS AND RECOMMENDATIONS

A. *LEX SPECIALIS*

The second paragraph of the committee explanation for the draft states that the draft is a "special" law or *lex specialis* defining more clearly the rights of citizens to determine state status under Article 2, Paragraph 4 of the Constitution of Montenegro. The Constitution of Montenegro does not contain any articles that govern the applicability of a special law over a general law. Therefore, whether a special law or general law would apply to a particular controversy would be a legal question for a national court of competent jurisdiction to decide. However, it is an accepted legal principle in many jurisdictions that *lex specialis derogat lex generali:* a special law prevails over a general law on the matters specifically addressed in the special law. However, the principle does not establish that a special law prevails over a higher level of law, such as the Constitution. The constitutional concerns raised in prior ODIHR assessments are still relevant.

Both the draft *lex specialis* for state status and the general Referendum Law would apply to a referendum for state status in Montenegro. The *lex specialis* would govern the matters specifically addressed in the special law and the general Referendum Law would govern those matters not specifically addressed in the *lex specialis.* In the event of a conflict between the two laws, such as the conflict on the quantum of vote required to approve a referendum decision, then the special law would control over the general law.

B. RESIDENCY

Article 2 of the draft establishes a residency requirement of 24 months in Montenegro as a condition to voting in a referendum on state status. This is consistent with the general residency requirement of 24 months that applies to voting in parliamentary elections. The comments in paragraph III E of the Assessment of 6 July remain applicable, namely that enfranchising FRY citizens of Montenegrin origin living in Serbia, cannot be recommended.

C. TIMELINE FOR CALLING AND HOLDING A REFERENDUM

Article 5 provides that no less than two months and no more than six months shall pass between the day of calling the referendum and the day of holding the referendum. Considering the significance of the referendum question, this timeline is reasonable.

D. REFERENDUM DECISION BY SIMPLE MAJORITY

Article 9 of the draft *lex specialis* provides that a decision is taken by a "majority vote of the citizens who cast their ballots". The Referendum Law, however, provided for a simple majority decision *if at least 50% plus 1 of the registered voters cast a ballot.* In paragraph III B of the Assessment of 6 July ODIHR stated: "The requirement for 50%+1 participation is a positive threshold to guard against the taking of key decisions with too low a level of public engagement or support".

The removal of this minimum turnout provision in the draft *lex specialis* is apparently intended to prevent boycott of the referendum by the opposition. **ODIHR cannot recommend** the absence of any qualified or weighted mechanisms for two reasons: firstly, the legitimacy of a referendum with less than 50% participation would be open to challenge both domestically and internationally; secondly, pressure on the opposition through such means is unlikely to achieve the intended results, may further increase political polarisation, and hence may itself serve as an incentive for the opposition to abstain. The fact that a two thirds parliamentary majority is required for constitutional amendment under Articles 117 – 119 of the Constitution should also be borne in mind.

ODIHR urged in paragraph III B of the Assessment of 6 July, that some qualified or weighted majority should be introduced for a referendum result to be valid: "International law and the OSCE commitments contained in the Copenhagen Document include no standards on the issue. However, best international practice in conducting referendums in similar situations inform us that some level of weighted or qualified majority is preferable in order for the outcome of a referendum to be less contestable and stability safeguarded. Furthermore, a qualified majority requirement reduces the potential for repetitive referendums over the same issue as a result of minor shifts in the public mood".

ODIHR recommends that there be a qualified or weighted majority of the votes cast or of the registered voters, for a referendum question to be approved. The minimum turnout provisions in the Referendum Law of 19 February 2001 do not adequately meet this requirement.

ODIHR reiterates that there are no clear international standards on the issue of the relevant majority, and that the recommendations are based upon best international practice, concern for internal and regional political stability, and the imperative to ensure domestic and international confidence in any referendum process in Montenegro.

E. REFERENDUM QUESTION

Article 6 in the draft *lex specialis* defines the referendum question to be "Do you want the Republic of Montenegro to be an independent state with full international and legal personality?" In paragraph III C of the Assessment of 6 July, ODIHR recommended that the procedure for adopting referendum questions be detailed in the law, since the wording of the question is of crucial importance. The solution of prescribing the question in the draft *lex specialis* itself has adequately met this concern.

ODIHR recommended in paragraph III C of the Assessment of 6 July that *two* questions could be considered. This remains an option of political choice which the political parties of Montenegro may wish to consider.

F. PUBLICATION OF REFERENDUM RESULTS

Article 10 of the draft provides that the referendum results shall be published in the Official Gazette of the Republic of Montenegro no later than 30 days from the date of

holding the referendum. The possibility of delaying the publication of results for 30 days on such an important question should be avoided. ODIHR **recommends** that this deadline be reduced.

G. REFERENDUM RESULTS ARE BINDING ON THE ASSEMBLY OF MONTENEGRO

Article 11 of the draft provides that the referendum results are binding on the Assembly of Montenegro. The comments at paragraph III A of the Assessment of 6 July are particularly applicable to this issue. Given the apparently ambiguous articles of the Constitution and the potential for varying interpretations, **ODIHR recommended** in the Assessment of 6 July that the Constitutional Court of Montenegro address the issue before any referendum is held. Moreover, **ODIHR recommends** that the Constitutional Court address the additional issue of a special law attempting to prevail over a superior law, the Constitution of the Republic. The implication of this provision is that a small minority of voters may eventually undermine the mandate of a democratically elected Parliament.

ANNEX - OSCE/ODIHR ASSESSMENT OF THE REPUBLIC OF MONTENEGRO/ FEDERAL REPUBIC OF YUGOSLAVIA REFERENDUM LAW, 6 JULY 2001

Office for Democratic Institutions and Human Rights

ASSESSMENT OF THE REFERENDUM LAW REPUBLIC OF MONTENEGRO FEDERAL REPUBLIC OF YUGOSLAVIA

Warsaw
6 July 2001

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ASSESSMENT OF THE REFERENDUM LAW
REPUBLIC OF MONTENEGRO
FEDERAL REPUBLIC OF YUGOSLAVIA
6 July 2001

I. INTRODUCTION

This assessment reviews and comments on the Law on Referendum, dated 19 February 2001, for conducting referendums in the Republic of Montenegro/Federal Republic of Yugoslavia.[1] This assessment is based on unofficial English translations of the following: (1) the Referendum Law, consisting of forty-four (44) articles, (2) Law on the Election of Councillors and Representatives of the Republic of Montenegro (2000),[2] (3) Law on Registers of Electors of the Republic of Montenegro (2000),[3] (4) Citizenship Law of the Republic of Montenegro (1999),[4] (5) Constitution of the Republic of Montenegro (1992), (6) Constitution of the Federal Republic of Yugoslavia (1992), and (7) Citizenship Law of the Federal Republic of Yugoslavia (published in the Official Gazette of the Federal Republic of Yugoslavia, No. 33/96).

This assessment reviews and comments on the text of the Referendum Law only, and should not be construed as an endorsement or recommendation for a referendum in the Republic of Montenegro; nor should this assessment be construed as an endorsement or approval of any question that may be subsequently decided by a referendum.

This assessment does not guarantee the accuracy of the translations reviewed. Unfortunately, mistakes do occur in translation and "shall", on occasion, becomes "may" and "may" becomes "shall". Obviously, mistakes in translation result in erroneous assessment of text.

The Office for Democratic Institutions and Human Rights of the Organisation for Security and Co-operation in Europe (OSCE/ODIHR) has been requested to review and provide comments on the existing legislative framework for elections in Montenegro, as well as different versions of the Referendum Law as it has been revised in the drafting process.[5] The Referendum Law reviewed herein has incorporated many of the comments and recommendations made previously and, therefore, is an improved law. Specifically, the current Referendum Law has improved by including previous recommendations for (1) deletion of provisions that allowed for a referendum to be held within seven days of the referendum announcement, (2) clarification of the articles regulating the hours of polling, (3) clarification of the articles regulating the form of the ballot, (4) increasing the time

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1 Herein "the Referendum Law".

2 Herein "the Election Law".

3 Herein "the Voter Register Law".

4 Herein "the Citizenship Law".

5 These include Comments on the Draft Law on Registers of Electors, dated 16 and 22 March 2000, Comments on the Draft Law on Election of Councillors and Representatives and pending amendments, dated 24 March and 3 April 2000, and Assessments of the Draft Referendum Law and pending amendments, dated 24 November 2000 and 15 January 2001.

period before a referendum can be held again on a failed referendum question, (5) clarification of the articles regulating ballot validity, (6) requiring that mobile voting be administered by two election commission members instead of one, and, where possible, that the two members be from different political parties, (7) clarification of the articles regulating what information should be included on the protocols of voting results, (8) clarification of the articles regulating the inking requirements for referendums, (9) clarification of the articles regulating the content of the decision appointing members of election commissions for municipal referendums, and (10) clarification of the articles regulating the procedure for complaints and appeals regarding irregularities in referendums.

This assessment supersedes all prior assessments on referendum legislation of the Republic of Montenegro prepared by OSCE/ODIHR.

II. EXECUTIVE SUMMARY

Articles in the Montenegrin Constitution addressing specifically referendums, the changing of the status of the Republic, and the calling of early parliamentary elections in certain circumstances of proposed constitutional amendment, appear to leave scope for different interpretations. Clarification by the Constitutional Court is recommended before any referendum is contemplated.

The Law on Referendum in the Republic of Montenegro requires a simple majority of registered voters to cast ballots and a simple majority of those casting ballots to approve a referendum. International law and the OSCE commitments contained in the Copenhagen Document include no standards on the issue. However, best international practice in conducting referendums in similar situations informs us that some level of weighted or qualified majority is preferable in order for the outcome of a referendum to be less contestable and stability safeguarded.

In Montenegro, the option of more than one question in referendums could be considered. The rules and procedures for conducting referendums should be clear and they should be agreed long before a call for a referendum. The frequency of referendums on sovereignty could be limited by law.

Some political parties in Montenegro have demanded that for a referendum on the State and legal status of Montenegro, Federal Republic of Yugoslavia citizens born in Montenegro but living permanently in Serbia should be enfranchised. For reasons detailed below, ODIHR cannot recommend the inclusion of such federal citizens.

Although the Referendum Law includes many recommendations made previously by OSCE/ODIHR, prior recommendations for changes to ensure transparency in the counting and tabulation of the voting results have not been adopted. The concern remains that the Referendum Law does not adequately ensure transparency in the counting and tabulation of the voting results of a referendum.

Prior recommendations for changes regarding election observers have not been adopted and the concern remains that the Referendum Law does not adequately provide for election observation in a referendum.

Many of the prior recommendations for improvement in the voting processes have been adopted. However, not all recommendations have been adopted. Thus, specific recommendations have accordingly been made again in this assessment.

The Referendum Law complies with the Constitution of the Republic of Montenegro and the Constitution of the Federal Republic of Yugoslavia. However, Article 3 of the Referendum Law should be considered in conjunction with Articles 2, 118 and 119 of the Constitution of the Republic of Montenegro as these articles regulate the same subject matter – changes in territorial status and form of government. Additionally, any decision to hold a referendum should comply with the publication requirements of Article 108 of the Constitution of the Republic of Montenegro and Article 116 of the Constitution of the Federal Republic of Yugoslavia, and the date established for a referendum should take into consideration these requirements.

III. COMMENTS AND RECOMMENDATIONS

A. THE CONSTITUTIONAL REQUIREMENTS

Three articles, *inter alia*, in the Montenegrin Constitution deal directly with referendums and the changing of the status of the republic, Articles 2, 118 and 119.

Article 2, paragraph 4 reads:

> "Any change in the state status, change of the form of government and any change of frontiers shall be decided only by citizens in a referendum".

Article 118 reads:

> "Amendments
>
> The changes to the Constitution shall be made by virtue of the Amendments to the Constitution.
>
> Draft
>
> The Assembly shall provide a Draft Amendment to the Constitution.
>
> The Assembly shall decide on the amendment to the Constitution by a two–thirds majority vote of all representatives."

Article 119 reads:

> "Significant amendments and a new Constitution

> If the proposal to amend the Constitution addresses the provisions regulating the state status and the form of government, if those provisions restrict freedoms and rights, or if the passing of a new Constitution is proposed, the Assembly shall be dissolved on the day the proposal is adopted, and a new one convened within 90 days from the date the proposal is adopted.
>
> The new Assembly shall decide by a two-thirds majority vote of all representatives only about those amendments to the Constitution contained in the adopted proposal, i.e. the adopted proposal for the promulgation of a new Constitution."

The consequence of these provisions appears to be that, after a referendum has been held on the status of Montenegro, the parliament shall approve the result by two-thirds majority, then dissolve, elections should be called, and then the new parliament shall approve the result with two-thirds majority within 90 days.

In at least two of the cases mentioned in Article 119 ("regulating the state status and the form of government") a referendum must be called according to Article 2. However, Article 119 fails to refer to Article 2, and thus leaves a certain ambiguity since the two Articles appear partly to overlap.

Some argue that this rather long and complicated process appears to contemplate cases when no referendum has taken place, i.e. occasions when the parliament attempts to make major changes to the Constitution without having called a referendum. They go on to state that this procedure should not be necessary if a referendum has already been held, since the electorate in such circumstances has already expressed its will. Consequently, they urge an amendment to Article 119 to omit the demand for the parliament to dissolve where a referendum has been held as prescribed in Article 2. They further argue that the democratic coherence of the demand for a two-thirds majority of the parliament to verify a referendum result can be questioned. A referendum is usually considered as the supreme democratic form of expression, and should therefore take precedence over other mechanisms.

Given the apparently ambiguous articles of the Constitution and the potential for varying interpretations, **ODIHR recommends** that the Constitutional Court of Montenegro address the issue before any referendum is held.

B. BINDING REFERENDUM DECISIONS AND MAJORITY REQUIREMENT

Article 4 of the Referendum Law provides that decisions made by referendum shall be binding. Article 11 of the Referendum 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 adopt the law, regulation, or other enactment.

The Law is unclear as to the precise extent to which a referendum is binding. Article 3 provides that a "referendum can be called for the purpose of obtaining an opinion of the citizens". Article 4, however, stipulates that "the outcome of the referendum shall be binding". The issue may require consideration by the Constitutional Court.

The Referendum Law requires a simple majority (50%+1) of registered voters to cast ballots and a simple majority of those casting ballots to approve a referendum. The requirement for 50%+1 participation is a positive threshold to guard against the taking of key decisions with too low a level of public engagement or support.

However, as mentioned above, if the referendum addresses certain issues requiring constitutional amendment, the Parliament must approve any legislation to implement the outcome of the referendum with a two-thirds majority vote. Thus, under the current Constitution, a constitutional crisis may result from a referendum approved by a more slender margin than is represented by a two-thirds majority in parliament.

International law and the OSCE commitments contained in the Copenhagen Document include no standards on the issue. However, best international practice in conducting referendums in similar situations inform us that some level of weighted or qualified majority is preferable in order for the outcome of a referendum to be less contestable and stability safeguarded. Furthermore, a qualified majority requirement reduces the potential for repetitive referendums over the same issue as a result of minor shifts in the public mood.

There are basically two ways of establishing a qualified majority: either by weighting the registered voters or by weighting the participating voters.

Majority of registered voters

In some countries, referendum proposals require more than a simple majority to pass; they must be supported by a certain percentage of the registered electorate. Rules that require a certain proportion of the total electorate to back a proposal before it can be deemed to have passed are sometimes introduced to ensure that small numbers of voters cannot sway the issue when the majority is indifferent.

Denmark used a qualified majority provision in the 1950s when first 45%, then later 40% of the registered voters, were required for referendum decisions to pass, although the threshold was subsequently abolished.

In Montenegro, some political parties have suggested that a qualified majority of 50%+1 of all registered voters voting in favour of a proposal should be necessary for a referendum result to be valid. Such a provision represents a substantial threshold at conventional levels of turnout. The following figures indicate the percentage majorities that would in effect apply for given levels of turnout:

Turnout	**Majority Required**
65 %	76.9 %
70 %	71.4 %
75 %	66.7 %

80 %	62.5 %
81.8 % (as in election of April 2001)	61.1 %

Qualified Majority of participating voters

"Super-majority" provisions are more common for the type of territorial/statehood issues envisaged in Montenegro. One example is the 75% majority set for approving a proposal that several Pacific States used when voting on their Free Association proposals with the United States. This resulted in the ongoing association of some States that surmounted this threshold (the Northern Marianas) and the separation and independence of others that did not (e.g. Palau). More recently, the independence referendum proposed (but not yet implemented) for Bougainville has set a two-thirds majority provision.

ODIHR recommends consideration of some level of weighted or qualified majority in order to safeguard the stability of the Republic and the region. The authorities of Montenegro should consider the merits of a qualified majority requirement, either based on a percentage of the registered voters or of the participating voters, in order to approve a referendum addressing constitutional issues.

In the absence of determining international standards on the issue, the widest possible domestic political approval of the referendum regulations and proceedings is desirable before a referendum is called in Montenegro.

C. REFERENDUM QUESTIONS

Major problems are associated with holding a *Yes/No* referendum on self-determination in a deeply divided society. One side will always lose. The two-option ballot is inevitably highly adversarial.

The wording of referendum questions is of crucial importance. The more precise the questions, the more meaningful the result. Similarly, the issue of who decides on the wording of the question should be stated explicitly in any legislation dealing with the referendum. In general, too often the actual wording of the ballot is the responsibility of a very small number of persons - usually the government.

The Montenegrin Referendum Law fails to address the referendum questions' issue. **ODIHR recommends** that the procedure for adopting referendum questions be detailed in the law.

Some creative applications of voting techniques are worth considering. In a number of countries, variations of multi-option voting have been used - Finland, Sweden, New Zealand, and Puerto Rico for example.

In Montenegro, two potential questions currently seem to be relevant in relation to the state and legal status of the Republic. Either an independent Montenegro with a number of common institutions established together with Serbia (i.e. the "Union" that the DPS/SDP Platform envisages), or a revitalised federation with Serbia (i.e. the Platform of DOS), appear to be the principal political options at stake.

ODIHR recommends considering the option of more than one question in referendums. In Montenegro, at least two options would appear desirable.

In the case of two or more questions, the qualified majority question returns. Clearly, with more questions it will be harder for any one question to gain a strong majority. A simple majority may be politically acceptable to all sides in the case of two or more questions. **Consideration** should therefore be given as to what the majority requirements will be in case of more than one question, and secondly as to which procedures should be followed in case none of the questions gains enough votes.

D. CITIZENSHIP REQUIREMENTS FOR VOTING IN REFERENDUMS

Montenegro adopted a new Citizenship Law in 1999. The new Citizenship Law increased 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. Concern has been expressed in prior ODIHR assessments of electoral legislation 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.[6] OSCE/ODIHR is aware that the Citizenship Law in effect has not been applied in relation to suffrage rights, and that the authorities have continued to base the voter registers on Yugoslav citizenship and residence records.

Furthermore, it is likely that the passage of time, since the effective date of the new Citizenship Law, has mitigated the concern expressed in paragraph above. However, this concern is still valid relative to a person who has voted in previous elections, but who has been required to re-apply for citizenship due to the additional residency requirement imposed by the new Citizenship Law and whose citizenship documentation has not yet been finalised.

ODIHR recommends that the Referendum 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.

E. RESIDENCY REQUIREMENTS FOR VOTING IN REFERENDUMS

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

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6 Article 109 of the Constitution of the Republic of Montenegro and Article 117 of the Constitution of the Federal Republic of Yugoslavia 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.

12 months residency in the respective municipal constituency. These requirements impact the Referendum Law in that Article 8 of the Referendum Law stipulates that citizens with the right to vote in conformity with the election regulations shall be entitled to vote in the referendum.

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.

Some political parties in Montenegro have demanded that for a referendum on the state and legal status of Montenegro, Montenegrin citizens living permanently in Serbia should be enfranchised.

A significant number of citizens of the Federal Republic of Yugoslavia (FRY), or former Socialist Federal Republic of Yugoslavia (SFRY), born in Montenegro, entitled by birth to Montenegrin citizenship, have moved to Serbia during past decades, have been residing in Serbia, have been voting in elections in Serbia, and have had no nexus with Montenegro other than their birth there. Their number is not possible to ascertain.

ODIHR cannot recommend the inclusion of such federal citizens, born in Montenegro but living permanently in Serbia, to be eligible to vote in Montenegro for the following reasons:

The law governing parliamentary elections limits the eligibility of voters to Montenegro citizens with two year residency in the Republic. All political parties in Montenegro, including the opposition, agree with this provision and have raised no objections. Even if the residency requirement were shortened to 6-12 months, a negligible number of additional citizens, if any, would qualify to vote.

- Under current arrangements, parliament will be called upon to implement with a two-thirds majority the outcome of the referendum. As such, the voters who elect the parliament and those who vote in the referendum should come from the same pool and have the same eligibility requirements.

- In the 1992 referendum to approve the current federation (FRY), the franchise was limited, as now, to citizens of either Serbia or Montenegro, residing in Montenegro.

- Citizens of FRY born in Montenegro but permanently living in Serbia, in essence, have taken the citizenship of Serbia and vote in elections there. If they were also allowed to vote in Montenegro, they would be given a double franchise within the same participating State.

- An attempt to register FRY citizens born in Montenegro but permanently living in Serbia may encounter insurmountable logistical difficulties.

F. CLARITY OF LEGISLATION AND FREQUENCY OF REFERENDUMS

The referendum legislation should be agreed long before the call for a referendum. The rules for conducting referendum should be comprehensive, detailed and unambiguous.

If the referendum rules are ambiguous, the aftermath of the referendum will result in political arguments about interpretation, perhaps the courts having to make the final decision, defeating the objective of the exercise, which is to ensure that the people make the decision.

Another aspect that may well be applicable to the situation in Montenegro is a limitation on the frequency of referendums. For example, in Northern Ireland the question as to whether it should remain within the UK or join the Republic of Ireland can only be put to the electorate once every 10 years.

Article 12 of the Montenegrin Referendum Law stipulates that a 12 month period must pass after a referendum before the same question can be re-proposed in a new referendum.

ODIHR recommends that this period be increased.

G. TRANSPARENCY IN THE COUNT/TABULATION OF REFERENDUM RESULTS

Articles 28 and 35 of the Referendum Law provide that the polling board shall establish the results of voting at the polling station. Article 35 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 referendum question(s). Article 35 requires this information to be "entered into the Record, that is the Report by the body in charge of administering the referendum".

ODIHR recommends that Article 35 be amended to expand the information to be established by the polling board. Article 35 should be expanded to include the ballot and voting information that is set forth in Article 36.

A significant shortcoming of the Referendum Law is its failure to require that referendum results be published at *all* levels of election administration, including polling, municipal, and Republic Commission levels. **ODIHR recommends** that detailed tabulations of overall referendum results be published at all levels of election administration and without any delay.

H. MOBILE VOTING

ODIHR recommends that Article 28 of the Referendum 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.

I. FORM OF THE BALLOT AND SECRECY OF THE VOTE

Article 29 of the Referendum Law incorporates the provisions of the Election Law regarding "election material" and "voting" to the extent not already governed by other articles in the Referendum Law.

Article 32 of the Referendum 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.

The Referendum 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 the ballot detachment provisions set forth in the Election Law may compromise secrecy of the ballot.

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 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.

ODIHR recommends that the voter, not a member of the polling board, 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 inappropriate 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.

J. OBSERVERS FOR REFERENDUMS

Article 29 of the Referendum Law specifically incorporates the provisions of the Election Law regarding "observation of elections" to the extent not governed by other articles in the Referendum Law. Thus, Articles 111a through 111g of the Election Law, which regulate domestic and international observers, apply to referendums. Additionally, Article 19 of the Referendum Law states that the work of the referendum administration bodies shall be public. However, Article 19 of the Referendum Law, and Articles 111a through 111g of the Election Law, fail to adequately provide for election observation in a referendum.

The requirement in Article 19 of the Referendum Law that "the work of the referendum administration bodies shall be public" is insufficient to ensure

transparency of the referendum processes. **ODIHR recommends** that Article 19 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.

In addition, **ODIHR recommends** that the provisions in the Election Law, which provide for observers, Articles 111a through 111g, be clarified to enhance the observation process. This is necessary as these articles apply to a referendum.

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. **ODIHR recommends** that Article 111b state both the dates for the start and end of registration for domestic observers.

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. **ODIHR recommends** that Article 111d state both the dates for the start and end of registration for international observers.

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. **ODIHR recommends** 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.

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. **ODIHR recommends** 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.

K. REFERENDUM CAMPAIGNS AND THE PUBLIC MEDIA

Article 15 of the Referendum 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 15 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.

Whether Article 15 is successfully implemented will be determined by the subsequent decision enacted by the competent assembly and the degree of enforcement made by competent authorities. **ODIHR recommends** that the subsequent decision enacted by the competent assembly be timely, understandable, and capable of objective application.

Article 15 does not address the issue of paid advertisements in private media. Consideration should be given to extending the Article 15 "equal terms" principle to paid advertisements in private media in order to ensure that both sides of a referendum are fully explained to voters. **ODIHR recommends** that the same commercial rate for referendum advertisements be offered to all campaigning parties and that the times and location of the advertising be on similar terms. Alternatively, the law could prohibit all paid political advertising in referendum campaigns. These suggestions are made since the Article 15 goal of informing voters *fairly* may be weakened if the "equal terms" principle regulates only public media.

The goal of Article 15 may also be circumvented if public media favours either side in the referendum campaign in news coverage, political coverage, forums, or editorials. **ODIHR recommends** that Article 15 be amended to prohibit biased coverage or treatment and that competent authorities be required to act immediately upon any violation.

L. ELECTION ADMINISTRATION BODIES FOR REFERENDUMS

Article 13 of the Referendum Law provides that "commissions" and "polling boards" shall be responsible for administering referendums. Article 20 provides that a commission shall consist of "a chairman, a secretary, and a certain number of the commission members". Article 20 also provides for deputies for the chairman, secretary, and all members. The chairman, secretary, and all members shall be selected from jurists 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.

Importantly, Article 20 of the Referendum 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. This improved manner of appointment should provide a more balanced and impartial election administration body.

M. PROTECTION OF CITIZENS' RIGHTS IN A REFERENDUM

Articles 16 and 38 through 42 of the Referendum Law govern protection of citizens' rights in a referendum. Articles 41 and 42 allow for complaints to the Constitutional Court of the Republic of Montenegro concerning actions of the municipal commission or Republic Commission. These articles adequately provide for the filing of complaints by citizens in order to protect suffrage rights.

N. REPEAT ELECTIONS

Article 29 of the Referendum Law specifically incorporates the provisions of the Election Law regulating "repeat elections".

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.

Under Article 28 of the prior law referendum law, repeat polling was required in a polling station if irregularities occurred that could have influenced the result of the election. The old Article 28 is preferable to Article 89 of the Election Law, which does not require that the irregularities could have influenced the result of the election before a repeat election is held.

ODIHR recommends that either (1) Article 28 of the prior referendum law be included in the present Referendum 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 results*. Repeat polling should not be held where the discrepancy could not have affected the election results.

O. CONVOKING A REFERENDUM

Article 5 of the Referendum Law provides that the decision on calling a referendum shall be made by the competent assembly. Article 5 of the Referendum Law, consistent with Article 83 of the Constitution of the Republic of Montenegro, specifies that a decision on the calling of a Republic Referendum shall be brought by a majority of votes of the total number of deputies. The use of a majority vote decision to call a referendum could weaken the institutional authority of the Assembly of the Republic. **ODIHR recommends** that consideration be given to amending the Constitution of Montenegro to provide more stringent requirements for convoking a referendum.

P. TIMELINE FOR CALLING AND HOLDING A REFERENDUM

Article 7 of the Referendum Law provides that no less than 45, and no more than 90 days, may pass between the day of calling the referendum and the day of holding the referendum. However, Article 7 must be read in connection with the publication requirements of Article 108 of the Constitution of the Republic of Montenegro and Article 116 of the Constitution of the Federal Republic of Yugoslavia, which 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. **ODIHR recommends** that care should be taken so that the date announced for holding the referendum

complies with constitutional requirements as well as Article 7 of the Referendum Law.

Q. ANNOUNCEMENT OF REFERENDUM RESULTS

Article 36 of the Referendum 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.

The announcement of results must comply with recommendations for transparency detailed earlier.