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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

JOINT OPINION

**ON THE DRAFT LAW
ON "ALTERING AND AMENDING THE LAW ON ELECTION
OF MEMBERS OF PARLIAMENT"**

OF THE REPUBLIC OF SERBIA

**by
the Venice Commission
and the OSCE/ODIHR**

**Adopted by the Council for Democratic Elections
at its 36th meeting
(Venice, 24 March 2011)
and by the Venice Commission
at its 86th Plenary Session
(Venice, 25-26 March 2011)**

on the basis of comments by

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I. Introduction.

1. On 25 February 2011, the Council of Europe office in Belgrade forwarded to the Venice Commission an official request from the Speaker of the Parliament Ms. Djukic Dejanovic for an urgent expertise of the draft partial changes of the Law on the election of representatives of the Republic of Serbia (hereafter "The Election Law"), regarding the blank resignations and the allocation of seats in the parliament (CDL-EL(2005)026 and CDL-REF (2011) 011).
2. Proposed changes have been made by the Parliamentary working group. This is one of the crucial issues for the negotiations process between Serbia and the European Union as well as for the Monitoring Committee of the Parliamentary Assembly of the Council of Europe.
3. The draft Law of the Republic of Serbia "Altering and Amending the Law on election of Members of Parliament concerns Articles 84, 88 and 92 of the law on election of MPs. Corresponding changes were introduced in Articles 22 and 198 of the Rules of procedure of the National Assembly.
4. This Opinion is based on consideration of the following documents:
 1. the Constitution of the Republic of Serbia;
 2. CDL-AD (2007)004 [Opinion on the Constitution of Serbia adopted by the Commission at its 70th plenary session \(Venice, 17-18 March 2007\)](#);
 3. CDL-AD(2006)013 [Joint Recommendations on the Laws on Parliamentary, Presidential and Local Elections, and Electoral Administration in the Republic of Serbia by the Venice Commission and OSCE/ODIHR Adopted by the Venice Commission at its 66th Plenary Session \(Venice, 17-18 March 2006\)](#)
 4. Resolution 1661 (2009) on honouring of obligations and commitments by Serbia of the Parliamentary Assembly of the Council of Europe;
 5. Report on honouring of obligations and commitments by Serbia of 15 September 2008 (Doc. 11701) of the Parliamentary Assembly of the Council of Europe;
5. This Opinion is based on unofficial English translations of the Election Law, Draft Law, and Constitution, and does not warrant the accuracy of the translations reviewed.
6. The present Opinion was adopted by the Council for Democratic Elections at its 36th meeting (Venice, 24 March 2011) and by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011).

II. Amendments to the Law on election of Members of Parliament.

Article 84

7. The first amendment concerns Article 84 of the Law and relates to the designation by the parties (or by other organizations which may submit lists of candidates) of persons qualified to sit in parliament, once the results of elections is known.
8. The original text gives total freedom for parties to nominate MPs from their lists, which they transmit to the Electoral Commission of the Republic.
9. The electoral system in Serbia is a purely proportional system, practiced in a single constituency with 250 seats. The parties are awarded seats according to the D'Hondt method. After the election parties distribute mandates between the candidates without being bound by any order of presentation of the list. There is no possibility of preferential voting.

10. This unusual system has already been severely criticised by the Venice Commission. Thus, in its opinion on the Constitution of the Republic of Serbia adopted at its 70th plenary meeting, the Commission issued the following opinion:

“Under Section 1 of this Article, the Deputies of the National Assembly are directly elected by the people. The Venice Commission understands this provision as requiring that the voters determine the composition of the National Assembly and outlawing the present practice that political parties may designate after the elections the persons to be considered elected on their lists. This practice is not in line with European standards” (CDL-AD (2007) 004, § 51).

11. Similarly, the Venice Commission and OSCE / ODIHR concluded in their joint report on the Law on the elections of MPs (Joint Recommendations on the laws on elections, presidential and local election administration in the Republic of Serbia, CDL-AD (2006) 013, § 43):

“Article 84 of the law allows a party to arbitrarily choose which candidates from its list become members of parliament, after the elections, instead of determining the order of candidates beforehand. This limits the transparency of the system and gives political parties a disproportionately strong position vis-à-vis the candidates. Under proportional representation systems, the order on the list usually determines the allocation of mandates; otherwise, mandates are allocated on the basis of preferential votes for candidates. The current system results in voters not knowing which candidates are likely to be seated as a result of their support for a particular party. The OSCE/ODIHR and the Venice Commission recommend that the law should be amended to oblige political parties and coalitions to determine and announce the order of candidates on their list before the elections, rather than allowing them to choose after election day which candidates will be awarded mandates.”

12. It is also questionable whether this legislation is not contrary to Article 2 of the Constitution of Serbia on the exercise of sovereignty and its Article 5, last paragraph that provides that: "Political parties may not directly exercise power or submit it to their control."

13. This system also seems difficult to reconcile with the spirit of the Constitutional Court decision of May 27, 2007 (I U-197/02) which, deciding on the legal provision on the loss of the parliamentary mandate by a MP in case of change of party, stressed that the parliamentary seats belonged to elected MPs and not to their parties.

14. The system appears contrary to OSCE commitments, including paragraphs 5.1, 6, and 7.9 of the 1990 Copenhagen Document,¹ Article 25 of the International Covenant on Civil and Political Rights (ICCPR) 2, and other international good practices.³

¹ (5.1) free elections that will be held at reasonable intervals by secret ballot or by equivalent free voting procedure, under conditions which ensure in practice the free expression of the opinion of the electors in the choice of their *representatives*;

(6) The participating States will accordingly respect the right of their citizens to take part in the governing of their country, either directly or through *representatives* freely chosen by them through fair electoral processes (...)

The participating States will [...]

(7.9) ensure that *candidates* who obtain the necessary number of votes required by law are duly installed in office and are permitted to remain in office until *their* term expires or is otherwise brought to an end in a manner that is regulated by law in conformity with democratic parliament.

² See General Comment 25 of the United Nations Human Rights Council (UNHRC), Paragraphs 15 and 19. The UNHRC has adopted a General Comment (General Comment 25) interpreting the principles for democratic elections set forth in Article 25 of the ICCPR.

³ See CDL-AD(2007)018, point six.

15. It is also questionable whether the procedure for appointing elected MPs is compatible with Article 3 of the first additional protocol to the ECHR (“free expression of popular opinion on the choice of the legislature”). Voters who have relied on the order of the list may indeed see their expectations completely deceived.

16. The system of appointment of elected officials is tempered by the amendment to Article 84. This amendment requires that at least half of the seats won by a political party will be allocated to candidates according to the order of the list, while the remainder of seats will be allocated through the previous system of discretionary designation by the parties (new § 1).

17. Although a step forward, the amendments to Article 84 do not substantially improve the legal framework.

18. The explanatory memorandum to the Draft law justifies this approach by the proximity of elections and the lack of political consensus among different political forces for a comprehensive reform. This same memorandum denounces the well known shortcomings of a system of proportional representation operating in a large single country wide constituency.

19. These arguments do not seem sufficient to maintain, even partially, an appointment system of elected candidates which is ostensibly contrary to the European and international standards.

20. Other European countries such as the Netherlands, also have a proportional electoral system with a whole country being a single constituency, and never deviate from the basic principles of democracy.

21. For example, if regional representation is taken as an argument by the explanatory memorandum, it could be achieved through the very establishment of the list with a certain number of eligible positions reserved for different regions.

22. The proposed amendments to the Election law do not seem to make the procedure more transparent, since "at least" half of the elected officials will be designated in the order of the list by the party. With the system of closed lists which is applied in Serbia such designation may result in all elected candidates being selected solely by the party – a procedure not clear for the voters when they cast their votes.

23. Similarly, the bill gives some kind of guidance to parties who need to take into account the exceptional performance of the candidates and their regional roots. The guidelines are blurred and add ambiguity to the allocation of mandates. In addition, it does not appear possible to take into account the exceptional performance of the candidates, in the absence of preference voting and of constituencies.

24. The draft amendments state that a “submitter of the electoral list shall see that 25% of the seats won are allocated to the representatives of the under-represented sex on the list.”

25. Thus, it would appear that the draft amendment will increase the number of women MPs. However, the draft amendments would benefit from a provision establishing that at least 25% of the under represented sex is allocated seats in the system of closed lists.

Article 88

26. A change takes place in article 88 of the Act dealing with the end of term. The Constitutional Court in its decision of May 27, 2003 (IU-197/02), already struck down two provisions of this section which provided for loss of office in case of change of party by an MP or his/her

exclusion by the party (Article 88 § 1, 1) and 9)).

27. The bill adds two new paragraphs to the first paragraph. They provide the procedures for blank resignation and consider that such resignation is tantamount to surrender by the MP of his/her seat to his/her party.

28. This is based on Article 102, paragraph 2 of the Constitution of the Republic of Serbia. Its text provides: "Under the terms stipulated by the Law, a deputy shall be free to irrevocably put his/her term of office at disposal to the political party upon which proposal he or she has been elected a deputy" (see the text of the Constitution – doc CDL(2006)089).

29. This constitutional provision introduces a kind of imperative mandate, not in the hands of voters, but for the benefit of the party leadership. This is especially true if it is viewed in the context of the designation of the members of parliament themselves (Article 84)⁴.

30. This paragraph 2 of article 102 has been strongly criticised by the Venice Commission, which writes in its opinion CDL-AD(2007)004 (§ 53) :

"Section 2 of this Article states that "Under the terms stipulated by the Law, a deputy shall be free to irrevocably put his/her term of office at the disposal [of] a political party upon which proposal he or she has been elected a deputy". It seems that its intent is to tie the deputy to the party position on all matters at all times. This is a serious violation of the freedom of a deputy to express his/her view on the merits of a proposal or action. It concentrates excessive power in the hands of the party leaderships. This is all the more worrying due to the excessive role of the National Assembly in judicial appointments in general and in particular in the reappointment process for all judges foreseen in the Constitutional Law on the Implementation of the Constitution. It reinforces the risk of a judicial system within which all positions are divided among political parties."

31. The amendment to Article 88 may be considered, by some of its aspects, as a way to circumvent the decision of the Constitutional Court of May 27, 2003, in the case of a change of party or exclusion from it.

32. The Explanatory memorandum to the draft law provided in annex 2 of the draft amendments, states that for the past two years the National Assembly has not been accepting blank resignations.

33. To the knowledge of the Commission there is no statute organising the blank resignation under Article 102, paragraph 2 of the Constitution. Thus, the amendment to Article 88 would be the first legal norm in this regard.

34. While the amendments outline conditions to recognise the validity of such resignations, the practice of authorising blank resignations in the election law, irrespective of the conditions should be avoided.

35. Further, the Commission agrees with the opinion of the National Assembly, expressed recently, that all blank resignations are inherently invalid. Article 102, paragraph 2 of the Constitution should, as previously recommended by the Venice Commission, be repealed at the earliest opportunity.

⁴ See also CDL-AD(2009)027 [Report on the Imperative Mandate and Similar Practices adopted by the Council for Democratic Elections at its 28th meeting \(Venice, 14 March 2009\) and by the Venice Commission at its 79th Plenary Session \(Venice, 12-13 June 2009\)](#) .

Article 92

36. The amendment seeks to align the procedures for replacing an elected MP by another candidate from the list presented for elections. Section 92 provided that in the former case the party which returns the seat was free to choose at its discretion a substitute.

37. The new text reflects the amendment to Article 84. If the holder of office has been designated according to the order of the list, his successor will be designated in the same way. If, instead, the incumbent has been designated by the party itself (or any other organisation authorised to submit lists of candidates), his/her successor will be chosen by the party.

38. This provision reproduces the problems relating to the allocation of seats raised above.

III. Decision on Altering and Amending the Rules of Procedure of the National Assembly

39. The amendments also address articles of the Rules of Procedure of the National Assembly that relate to "floor crossing". Amendments to Article 22 would prevent a "floor crosser" from joining another parliamentary group in the National Assembly.

40. Whereas some limitations on "floor crossing" might be permissible when strictly necessary and applied proportionately, the draft amendment is an absolute restriction. As an absolute restriction, it appears contrary to the spirit and text of Article 11 of the European Convention on Human Rights whose possible restrictions should be strictly necessary in a democratic society and proportionate. The right to freedom of association is also recognized in the 1990 Copenhagen Document and in other international instruments

IV. Conclusion

41. The aim of the draft Law of the Republic of Serbia "Altering and Amending the Law on election of Members of Parliament is to change the practice of distribution of mandates between the candidates without being bound by any order of presentation of the list and to restrict the practice of blank resignation letters handled by the elected MPs to their respective parties. The draft amendments are brief. Other important recommendations that were previously made remain unaddressed. The draft introduces some changes limiting the possibility by political parties to select candidates at their will and to exercise control over their mandates, however, the parties still keep part of their discretionary powers as regards the appointment of half of the elected MPs from the list, which is contrary to the European standards.

42. As has been already stressed in previous opinions of the Venice Commission and in recommendations of other international bodies, notably those of the Parliamentary Assembly of the Council of Europe, parliamentary seats belong to elected MPs and not to their parties. In the short term, the inclusion of modalities for organising blank resignations in the election law should be reconsidered as it risks replicating a constitutional provision that has previously been criticised, as well as reinforcing the imperative mandate. The national legislation should be further improved in order to fully meet the democratic standards. In the middle or long term an amendment to paragraph 2 of Article 102 of the Constitution of the Republic of Serbia seems indispensable.