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NDI COMMENTARY ON CeSID's DRAFT LAW ON THE ELECTION OF DEPUTIES, COUNCILORS AND THE PRESIDENT OF THE REPUBLIC OF SERBIA

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Introduction

At the request of the Serbian Center for Free Elections and Democracy (CeSID), the National Democratic Institute for International Affairs (NDI) convened an international advisory group of comparative constitutional and election law experts to review CeSID's Draft Law on the Election of Deputies, Councilors and the President of the Republic of Serbia. This review sought to assess the draft election law in light of internationally established criteria for democratic elections and Serbia's specific conditions for ensuring public trust in the electoral process.

NDI's international election law review group included the following experts: Matthew Frumin, with the law firm of Steptoe & Johnson and former Special Assistant to the U.S. Under Secretary of State for Global Affairs; Tara R. Gingerich, also with the law firm of Steptoe & Johnson; Scott Sinder, with the law firm of Collier Shannon Scott; Ann Colville Murphy, NDI Special Counsel on Electoral Programs; and Patrick Merloe, NDI Senior Associate and Director of Programs on Election and Political Processes. Each member of the group not with NDI contributed his or her time freely and in an individual capacity. NDI is grateful for this valuable assistance, which demonstrates the international community's interest in supporting efforts to build democracy in Serbia. NDI staff, knowledgeable about Serbia's political situation and about its election processes, also contributed to this review.

NDI is a nongovernmental organization working to strengthen and expand democracy worldwide. As part of its mandate, NDI conducts election programs that focus on constitutional and law reform efforts, international election assessments and observer delegations and election monitoring by domestic nongovernmental organizations and political parties. The Institute has provided election law commentaries in more than 30 countries around the globe, drawing on a worldwide network of expert volunteers and NDI staff.

Overview

These comments on the Draft Law on the Election of Deputies, Councilors and the President of the Republic of Serbia (the "Draft Law" or "Draft") are organized by Chapter, rather than by order of importance of the subject. Some Chapters required no comment or analysis. The commentary presented here is not intended to be exhaustive or to be duplicative of comments offered by other institutions.

In compiling these comments, the group reviewed the text of the Draft Law, the Serbian Constitution, an article by Professor Marijana Pajvancic, a member of the CeSID Executive Board, which provides a critical review of the current law, and background materials on the current political environment in Serbia. NDI also reviewed commentary on the Draft Law prepared by the Organization for Security and Cooperation in Europe/Office for Democratic Institutions and Human Rights (OSCE/OHIHR). NDI's comments are generally in agreement with those offered by ODIHR. The Institute and ODIHR maintain a cooperative relationship on thematic issues and in a number of countries. NDI has developed a close partnership with CeSID over the years since its formation and has been pleased to be associated with many of CeSID's election monitoring and civic participation activities. The Institute is honored to be called upon to offer comments on the Draft Law.

In sum, the Draft Law is impressive and reflects a thoughtful and accomplished effort to grapple with difficult issues in a particularly challenging setting. The Draft reflects well international norms and standards for democratic elections and makes use of international best practices in a significant number of areas to address complex and politically sensitive issues in the national political context. There is no perfect election system, and many practices can be employed to satisfy minimum international standards. The Draft Law in many areas goes well beyond the minimum in order to apply higher standards, which sets a commendable example. As is inevitably the case in drafting electoral legislation, there are a number of shortcomings and ambiguities in the Draft Law. It is hoped that the comments set forth below, which are based on NDI's experience around the globe as well as on international standards, will aid in further refining the Draft.

It should be noted at the outset that some of the comments presented below may be the result of translation issues or the interpretation given to a word or phrase that was not intended by the drafters. All comments are offered in light of the shortcomings of working in translation and are presented in the spirit of international cooperation with the efforts of CeSID and others working to improve the political process.

Chapter I Basic Provisions

This Chapter, in conjunction with Chapter II – Electoral Rights, sets forth a series of core principles that echo international standards regarding election processes. See e.g., Universal Declaration on Human Rights Article 21; International Covenant on Civil and

Political Rights (ICCPR) Articles 2, 3, 19, 21, 22 and 25, and United Nations Human Rights Committee General Comment 25 (General Comment 25); European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), Protocol 1, Article 3; Organization for Security and Cooperation in Europe 1990 Copenhagen Document (Copenhagen Document); United Nations Commission on Human Rights Resolution 2000/47 Promoting and Consolidating Democracy ("UNCHR Democracy Resolution")(April 2000); Final Warsaw Declaration: Towards a Community of Democracies, Ministerial Conference ("Warsaw Declaration")(June 2000); Sana'a Declaration, Emerging Democracies Forum ("Sana'a Declaration")(June 1999).

Draft Article 5 posits two alternatives – two or four-year terms for Deputies and Councilors. International standards require only that elections be "genuine and periodic." See e.g., ICCPR, Article 25(b). The decision between the alternatives, therefore, turns on practical considerations. On the one hand, shorter terms lead to greater responsiveness to the electorate. On the other, frequent elections can be expensive and can lead to "election fatigue." In this regard, if elections for the Presidency, National Assembly, Assembly of the Autonomous Provinces and Municipal and City Councils are on different schedules, two-year terms for Deputies and Councilors could result in very frequent elections

Draft Article 5 also provides that "Deputies and Councilors decide and vote freely according to their own beliefs." This is a laudable principle and implies that the key manner in which representatives are accountable for their votes is through subsequent elections. However, Draft Article 161 provides that a Deputy or Councilor's "mandate" can be terminated if "membership in the political party on whose list the Deputy/Councilor was nominated is terminated." Thus, Draft Article 161 appears to create a substantial mechanism to enforce party discipline, which may or may not conflict with the principle articulated in Draft Article 5. This issue is addressed further in the comments regarding Chapter XVII of the Draft Law.

Draft Article 9 states that on the day of calling an election, the opening date of the electoral campaign is determined. Since the law provides that campaigns may not last less than 45 days, while 60-90 days may pass between the calling of an election and election day, there could be a significant period of time after elections are called and before the official campaign period begins. It is not clear why this delay would be necessary.

Draft Article 10 includes a novel provision authorizing "every voter and every participant in the election process to appeal to international institutions for protection of human rights," provided that domestic remedies are exhausted. Such a provision – which it is acknowledged would require a Constitutional Amendment – could be a path-breaking development. As the concept and any relevant Constitutional Amendment are considered, however, a number of practical questions are likely to arise, for example: (1) which "international institutions" can be appealed to? (2) what power to impose a remedy will such institutions have? and (3) what is meant by "every participant in the electoral process?" Yugoslavia is a party to the ICCPR and its First Optional Protocol, which would allow citizens to seek redress before the UN Human Rights Committee after

exhaustion of domestic remedies for human rights violations, and citizens of state parties to the European Convention that have recognized the competence of the European Commission of Human Rights to receive citizen petitions may seek redress before the Commission after domestic remedies are exhausted.

Chapter II – Electoral Rights

Draft Article 12 contemplates two alternatives for qualification to vote – "citizens of Serbia" or "Serbia nationals." The "citizen" option is fully consistent with international standards. See e.g., ICCPR, Article 25 ("every citizen shall have the right..."). However, it is not entirely clear what is meant by "Serb national." If this is intended to capture the notion of "ethnic Serbs," regardless of their place of residence and/or country of citizenship, the approach would raise a number of problems, both as a matter of international standards and confidence building at home.

Pursuant to international standards, such an approach would appear to favor one ethnic group over others. Such an approach would run afoul of the requirement under the ICCPR that a State "ensure to all individuals within its territory and subject to its jurisdiction the rights recognized [in the ICCPR], without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." See ICCPR, Article 2(1); and European Convention Article 14. See also Warsaw Declaration (the right of every person to equal protection of the law); Sana'a Declaration ("ensure the rights of minorities are respected and that every effort is made to engage marginalized groups in the political process"); UNCHR Democracy Resolution ("taking measures as appropriate to address the representation of under-represented segments of society").

The ultimate measure of the success of an electoral process turns on the confidence and satisfaction of the electorate in that process. See e.g., Sana'a Declaration (describing the commitment among emerging democracies to "hold regular free and fair elections, with special attention to the need to build public confidence in the process.") Indeed, one key is that the parties that do not prevail, as well as minority groups, gain a sense that their voices and interests have been and can be heard through the periodic electoral process. Granting the vote to non-citizen, non-resident members of one ethnic group can only work to diminish the confidence of the other groups in the process.

By contrast, Draft Article 12 allowing "foreign citizens" that are permanently resident in FRY and have lived in their electoral unit for five years to vote in local elections for Councilors, is appropriate. This provision does not single out one particular group, but rather all "foreign citizens." It tends to increase representation of an otherwise under-represented (indeed unrepresented) group. While the ICCPR describes the electoral right as applying at a minimum to citizens and requires equality of treatment, granting the right to vote in local elections to qualifying foreign citizens without discrimination is consistent with the requirements of the ICCPR and an emerging practice. However, the term "full civil capacity," as used in Draft Article 12, should be defined unless the term is commonly understood in Serbia based on its use in other laws.

Draft Article 13 provides that citizens can "publicly put questions to candidates and receive answers to these questions" and imparts the right "to receive timely, true and impartial information about the programs and activities of the [parties and candidates]." This may be a translation issue, but the provision appears to imply a requirement that parties and candidates must answer all questions. That is an admirable, but likely impractical goal. The formulation in Draft Articles 17 and 19 is better, granting citizens the rights to "disseminate, receive and seek information" regarding the election and election participants and the right to monitor the activities of executive electoral organs and the right to use the complaint mechanism to protect electoral rights. See ICCPR, Article 19; and European Convention, Article 10. These issues are addressed more fully in the section on "Chapter VIII – Electoral Communication."

Draft Article 20 provides that voters as well as candidates and parties can seek legal remedies to protect their enumerated electoral rights. The provision also specifies that "members of executive electoral organs" can seek such remedies. It is not clear why an electoral official would seek a remedy if no voter, party or candidate were aggrieved and also seeking a remedy. It would appear that the real party in interest in electoral disputes would be voters, candidates or parties rather than election officials whose views did not prevail on the commission or committee. It is worth considering whether a separate right to pursue protection of electoral rights by election officials is necessary or appropriate, unless this is restricted to remedies in the event they were illegally prevented from conducting their rightful duties.

Chapter III – The Election of the President of the Republic

Draft Article 21 outlines three alternatives for qualification to be President: (1) citizenship; (2) citizen, 40 years of age and resident in the Republic of Serbia for 5 years; and (3) citizen, 40 years of age and resident for 10 years. Many countries have age, residency and even country of birth restrictions, particularly for qualification to be Head of State. However, in this case, imposing age and residency requirements would involve a change from the status quo and an amendment to the Constitution. If there is a political consensus to make such a change, then no issue would arise. If, however, making such a change was perceived by any significant portion of the electorate as an effort to block the candidacy of one or more specific candidates, then making such a change could undermine overall confidence in the process and would violate standards against political discrimination. While this scenario may not seem relevant for Serbia, in a number of countries age and/or period of residency requirements have been imposed that were either actually, or perceived to have been, motivated by such a political purpose. Those changes greatly undermined overall confidence in the electoral process.

Chapter IV – Electoral Units

Draft Article 26 provides that municipal and city councils must have between 20 and 110 Councilors. It is easy to imagine 20 Councilors being a very large number for a

small city or municipality. At the same time, it is difficult to understand why even a large city or municipality would require 110 Councilors. Best practices would warrant that consideration be given to allowing for significantly smaller Councils.

Draft Articles 27 and 28 specify that the electoral units for the Assemblies of the Autonomous Provinces and National Assembly are the whole Autonomous Province and Republic, respectively. The question of the number of electoral constituencies and the relative balance of proportional representation versus majoritarian representation are essentially domestic political issues. NDI therefore does not generally comment on specific propositions concerning these matters. Experience demonstrates that the political decisions on these issues, however, are best taken after broad public discussion and an inclusive, transparent political decision making process.

Chapter V – Electoral District and Polling Stations

Draft Article 30 sets a reasonable standard for electoral districts – 1000 to 1200 voters. The Draft specifies that deviations from this standard may be allowed in certain circumstances, including allowing for downward deviations in "mountainous regions." Further, Draft Article 30 allows election commissions to establish electoral districts with large variance from the norm so long as the decision is "justified." The Draft does not enumerate any rules governing what is "justifiable" and what is not, which leaves open the possibility that election commissions could have virtually unlimited discretion in this area. The drafters should therefore consider incorporating more specific guidelines regarding this issue.

Draft Article 31 provides that voting districts and polling stations be defined within 48 hours of the closing of the voter registry, which occurs 30 days before voting. See Draft Article 48. Within five days of the closing of the voter list, the relevant body is to draw up a full voter list for each of the allotted polling stations. See Draft Article 47. Pursuant to this approach, no more than 25 days in advance of the election, voters could be apprised of the place at which they will be voting. If appropriately utilized, this should provide adequate time to inform voters and allow for verification of the various voter lists. However, care should be taken to ensure that the law provides adequate opportunities for notice and verification. These matters are discussed more fully below under the general rubric of the adequacy of time. It is worth noting that the Draft specifies that no more than 90 days may pass between the date of calling an election and the date on which it is held. See Draft Article 52. This does not afford an abundance of time for the many things that will need to be accomplished in this period.

Draft Article 34 outlines the mechanism for allowing voting at diplomatic missions, on ships and for members of the armed forces and military academies. The provisions are sensible and are generally consistent with international practice. However, in implementing the provisions, special attention should be given to the potential for voter intimidation in each of these settings, particularly with military voting. See also Draft Articles 40 and 46 (regarding the procedures for the inclusion of such persons on

voter lists) and Draft Articles 120, 122 & 123 (describing the procedures for voting at such sites).

Chapter VI – Maintaining Records of Voters

Guaranteeing the accuracy and transparency of the voter list is a key element in electoral integrity and building confidence in the electoral process. The proposed system for maintaining the voter registry is commendable; however, there are a number of internal contradictions and ambiguities that require correction and clarification.

Draft Article 38 states that the voter list is a "public document," and Draft Article 43, for example, states that voters have the right of access to the voters list, to obtain excerpts of the list and to request changes to the list. Draft Article 43, however, states that the voter list and the data contained in it are "an official secret." In most countries "official secrets" may not be publicly disclosed. Legitimate concern over the potential misuse of information on the voter list in violation of the rights of voters is addressed elsewhere in Draft Article 43 ("Abuse of the data from the voters list is strictly forbidden and punishable by law..."). This provision, perhaps with more definition, would appear to be sufficient to protect voter rights. The official secret designation therefore could be eliminated.

There are numerous credible uses for the information included on voter lists, such as voter mobilization and campaign strategy. Protection of privacy rights of voters is a legitimate concern in every country, and security concerns in war-torn societies justify certain restrictions on access to voter list information, but the clear international trend is to provide political parties and election monitors access to voters lists for appropriate purposes.

One important way to build confidence in the electoral process is to allow for transparency of the voter lists. Experience demonstrates that political parties and nonpartisan election monitoring organizations should be granted access to the voter registration process to verify its accuracy and integrity. The current draft is silent on the right of political parties and nonpartisan election monitors in this respect, nor does the draft provide for public posting of voter lists for inspection. In addition, Draft Article 44 describes the method for maintaining the voters list but does not provide for procedures by which political parties and nonpartisan monitoring organizations can verify the integrity of computer programs nor does it provide for use of computer programs to test the accuracy of the list. Consideration should be given to providing for public posting of lists, so that voters can inspect it easily to determine if their names, addresses and other critical information is accurately recorded. Provisions should also be considered to give political parties and nonpartisan election monitors access to the voter registry and stages of production of voter lists for use at polling stations.

Draft Article 45 should define "authorized organ" and "authorized person" in relation to the entry of data into the voter list. Further, Draft Article 45 grants voters until 15 days before the election to request changes to the voter list, while Draft Article 48

states that the voter list closes 30 days before voting. This presumably creates a 15 day period for appeals regarding information on the voter list, but the interplay between the two provisions should be clarified.

It is not clear whether there is any recourse for a voter if the organ in charge of maintaining the voter list refuses to carry out a correction requested by the voter. Unless this is captured under the general rubric of Draft Article 144, which allows voters to file objections with the electoral commission regarding violations of electoral rights, then outlining the process for recourse within this Chapter would be worthwhile.

The provisions regarding the voter lists generally allot a relatively prominent role to the Ministry of Justice. See e.g., Draft Articles. 39, 43, 45, 46 and 50. Such an approach is not unheard of, but creates a certain tension. The Republican Election Commission, of which the Office of Joint Voter Lists (OJVL) is a part, is an independent agency. Placing it under the supervision and partial control of a Ministry regarding the particularly delicate task of managing the voter lists is curious. See e.g., Warsaw Declaration (describing a core democratic principle and practice as "free and fair elections...monitored by independent electoral authorities.") There is some confusion in the draft over which body has ultimate responsibility for the voters list, which needs to be clarified. Experience demonstrates that independent, impartial electoral authorities, are best suited to have ultimate administrative authority for voters lists with appropriate complaint procedures and effective remedies made available to voters and political contestants.

Chapter VII – Executive Electoral Organs

This Chapter outlines a complex structure and appointment process establishing the electoral administration. The Draft contemplates pyramid structures with: the Republican Electoral Commission ("REC") at the top for elections to the National Assembly and Presidency; Provincial Electoral Commissions ("PEC's") on top for the elections to the Assemblies for the Autonomous Provinces but playing no role in the elections for the National Assembly or Presidency; Municipal Electoral Commissions ("MEC's") filling in the next level of the pyramid in all elections and serving as the top of the pyramid for elections to Municipal and City Councils (it also appears that Cities might have electoral commissions when the City is not otherwise part of a Municipality); and Election Committees which are assigned to individual Polling Stations ("Polling Station Committees") forming the base.

These various organs are charged with organizing, implementing and overseeing the full electoral process (other than media issues assigned to the Media Electoral Council as described below). Therefore, the effectiveness and impartiality, as well as public confidence in the fairness of these institutions are key to the success of the electoral process. Given their important role, the make-up of election commissions is often very controversial. A number of approaches are taken which can generally be described as "non-partisan" or "politically balanced."

The Draft appears to outline a hybrid approach. It is worth considering whether the result is a mechanism that ultimately fits either description. For example, the National Assembly appoints the President and five initial members of the REC. These members must be lawyers. In principle the likely intention is that those six members would represent a cross-section of parties. However, it is not clear why a majority party or coalition could not advance its full slate, resulting in substantial bias on the REC

Parties or coalitions putting forward slates covering at least two-thirds of the seats at issue in the election may each appoint an extended/temporary member to the REC, with two seats reserved for smaller parties or coalitions. With regard to the nomination of these extended/temporary REC members, the REC itself must approve qualification of a party or coalition to make such an appointment within 24 hours of the publication of that party or coalition's electoral list. See Draft Articles 57 and 61. The appointment processes for the PEC's and MEC's are similar in relevant respects.

However, Draft Article 61 is unclear regarding how the extended/temporary membership slots would be filled. Although this may be a translation problem, it is unclear, for example, whether a proponent of each electoral list that satisfies the national candidate slate criteria is required to be appointed under Draft Articles 57 and 61, or whether only a representative of one such slate must be appointed. The provisions dealing with the smaller party representatives are also not clear regarding whether two such representatives must be appointed or whether the REC simply is empowered to appoint up to two such representatives if it so chooses.

Since the permanent members of the REC could all have shared political interests, these ambiguities could be extremely problematic. They would give the REC a mechanism for limiting the appointment of temporary members, which would enable the permanent members to maintain their monopoly on oversight of all phases of the election process. This problem is exacerbated because it appears that Draft Article 57 does not require that the permanent members of the REC allow participation of the extended/temporary members until 15 days before election day. That would effectively eliminate their participation in many of the crucial pre-election REC decisions, including approval of voter and electoral lists.

This system therefore may not produce "non-partisan" or "politically-balanced" commissions. The provisions therefore should be reconsidered in this light.

Experience demonstrates that that the method and criteria for selection of election commission members are volatile political issues that should be resolved based on public input and broad agreement among the political parties. In highly politically polarized societies, where public confidence in the effectiveness and impartiality of election commissions is not high, the "politically balanced" approach to selecting commission members often is the option most acceptable to the political contestants.

Draft Article 52 provides that the various electoral organs are independent and autonomous, which reflects international standards. However, Draft Article 52

simultaneously states that these electoral organs are accountable to the organs that appointed them, which means that the REC, PEC's and MEC's are accountable to the National Assembly, Provincial Assemblies and Municipal Assemblies respectively. Draft Article 54 also provides that the relevant Assembly is to appoint a "Secretary" to the Commission. These provisions appear to undermine the autonomy of the commissions.

Election commissioners should enjoy immunities similar to those provided to members of the judiciary and should be subject to removal only for cause and after due process of the law. They should be accountable to the law. The commissions themselves should be provided independent funding to cover budgets appropriated by legislative bodies and disbursed immediately. Draft Articles 165 and 166 should reflect this. Administrative staff, such as secretaries, should be hired by the commissions to ensure independent action. Draft Article 161's provision that a "representative of the of the [relevant] agency for statistical data processing is to take part in the work of the [REC, PEC's and MEC's] (Draft Article 61), should be considered in this light as well, given the sensitivity of data processing. In addition, Draft Article 51's provision that the General Administrative Proceeding Act applies should be reviewed to ensure that there is no compromise to the autonomy of electoral authorities, or specific procedural provisions should be considered for inclusion in the draft itself.

The Draft Law also appears to include gaps with respect to the transparency of election commission processes. The provisions in the Draft Law regarding the public nature of electoral organs are minimal (Draft Article 58). While stating the general principle that work of electoral organs is public, the Draft Law only specifies that (1) "those who submitted objections or complaints" to the body are to be invited to attend the meeting where such objections or complaints are to be decided; (2) candidates may not be present; and (3) accredited electoral organ monitors have the right to attend. Such a list could be interpreted as limiting the circumstances under which individuals other than members of the electoral body are allowed to attend the meeting and could fall short of international standards for transparency. To ensure satisfaction of the core transparency requirement, provisions should be included that require publicizing the time and place of electoral body meetings and that specify that all members of the public may attend.

Chapter VIII – Electoral Communication

Draft Articles 73-90, regarding media coverage, are generally very sound and in some respects exemplary. In particular the provision in Draft Article 73 setting out the rights of citizens to "timely, truthful and impartial information" and the provisions in Draft Article 74 of the rights of political competitors to equal access to the media and to timely, truthful and accurate information about their activities provide a clear statement of fundamental rights in the electoral context. Draft Article 73's reference to "all" activities of political contestants creates problems of practicality and might be qualified somewhat.

Several of the articles appear not to distinguish sufficiently between state controlled media versus private media, between media coverage made possible by state funds versus private funds or between broadcast media and print media. Also, there is no acknowledgement of the editorial prerogative, particularly for properly designated spaces in private media. See, e.g., Draft Articles 76, 77, 83 & 90. Clarification of some provisions seems warranted in light of guidelines on media coverage in elections published by Article 19, The Global Campaign for Free Expression, and others.

While Article 75 of the Draft Law states that all electoral and other state organs are to provide all the media with "equal access to information about the election," the nature of this information and access is not specified. A provision noting, for example, that all media outlets are permitted to televise and record all election-related activities (outside the voting booth) would enhance the value of this general principle and increase transparency of the electoral process.

The Draft Law's provisions regarding the creation of a Media Electoral Council are generally well developed (Draft Articles 84 through 90). Draft Article 86's provisions for expert media monitoring and reports to the Council are both practical and positive. Providing that the Media Council would be composed of members nominated by the professional journalist associations is also positive. However, providing that the National Assembly – without any Presidential or other party input – would have the sole appointment power could, as with the REC, potentially allow a majority party or coalition the power to select individuals who are favorable to its interests. That could undermine both the perceived and actual fairness of the overall election process.

Chapter IX – Candidacy

The Draft presents relatively low barriers to presenting a list of candidates. This could encourage participation, but also runs the risk of encouraging the proliferation of political parties or temporary political groups. Political parties already represented in the relevant body may simply submit a list; however, that list must include the names of enough candidates to fill at least one-fifth of the relevant seats. See Draft Articles 95 & 98. Other political parties, coalitions or citizens groups may propose lists but must meet modest signature requirements – the highest requirement being 5000 signatures for a list for the National Assembly.

The requirement that a voter can only sign one petition supporting the list of a political party, coalition or citizens group is, problematic. It is not practical for political contestants seeking signatures for ballot qualification to know whether a person signing their list of supporters has signed the list of supporters for another contestant. It is an unfair burden to then penalize the party or proponent should signatories turn out to have signed more than one list. Moreover, restricting citizens to signing only one support list prevents them from acting to ensure political pluralism through a clear choice on the ballot. It also increases the potential for intimidation of voters and can undermine trust in the secrecy of the ballot. The prohibition in Draft Article 99 on exerting any pressure on voters to sign electoral lists and on collecting signatures in workplaces is commendable.

However, the surest way to prevent undue pressure on voters is to allow them to offer their signatures in support of more than one electoral list.

Alternative Draft Article 95's provision that lists proposed by a group of citizens may contain candidates for fewer than one-fifth of the relevant seats, raises interesting issues. See Draft Article 95. One goal of an electoral process over time is to create relatively stable political parties. Providing an incentive to avoid the discipline of party-building could work to frustrate that goal. Moreover, it could lead to a proliferation of lists presented on the ballot, making it that much more difficult for voters to assess their choices and for parties and candidates to project their messages. It could also encourage the development of regionally based political parties. These concerns need to be reconciled with ensuring that new and smaller groups are able to participate in the electoral process.

The provision requiring that at least 30 percent of the candidates on a list be female and the requirements regarding ordering on the lists (see Draft Article 95) are laudable and should be considered in the context of anti-discrimination requirements of international human rights standards. For example, Article 2 of the ICCPR prohibits discrimination based in gender, while the Convention on the Elimination of All Forms of Discrimination Against Women (Article 4), to which Yugoslavia is also a party, provides that the adoption by states of temporary measures aimed at accelerating de facto equality between men and women shall not be considered discrimination. A number of countries have adopted measures to guarantee women positions on candidate lists. It would be important to include specific language in Draft Article 95 addressing anti-discrimination concerns. Decisions of the European Commission of Human Rights should also be consulted and efforts made to review documents of the OSCE including, but not limited to, the Copenhagen Document. Experience demonstrates that the political decisions on taking effective steps to secure specific minimum numbers of women on candidate lists and to secure advantageous places for women on the lists are best taken after broad public discussion and an inclusive, transparent political decision making process.

The Draft also requires that candidate lists be submitted no later than 30 days in advance of the election. See Draft Article 97. This would allow between 30 and 60 days (between calling the election and presenting the lists) to prepare the lists. That is likely enough time. However, it would allow only 30 days to manage any appeals and finalize the lists and ballots. It could also lead to a relatively short period during which voters would have a precise sense of their full set of choices.

The tightness of the schedule is reflected in the truncated 24-hour periods for the Commissions to review submitted lists, for proponents of lists to address any anomalies and for Commissions to review and opine on such revisions. See Draft Articles 102 & 103. The drafters should consider whether 24 hours is sufficient time for the Election Commissions to investigate the lawfulness, timeliness and orderliness of electoral lists (Draft Article 102) and, similarly, for proponents of electoral lists to dispose of shortcomings in the lists (Draft Article 103). It may be advisable to extend both periods slightly.

Chapter X – Electoral Documentation

No comments were deemed necessary for this Chapter. Please note that the Annexes referenced in this Chapter were not submitted for review.

Chapter XI – Technical Equipment for Elections

No comments were deemed necessary for this Chapter. Please note that the Annexes referenced in this Chapter were not submitted for review.

Chapter XII – Voting

This Chapter outlines detailed and sensible procedures for voting. While the overall framework is excellent, some consideration should be given to certain practical elements.

With respect to the preparation of polling stations for voting, the law does not address the transport and delivery of ballots and other materials to the polling stations. Provisions should be added about the timing of such delivery, the quantity of ballots to be delivered compared with the number of voters on the voter list.

The Draft requires that a "notification of voting" be mailed to voters five days before voting. See Draft Article 110. However, presentation of the "notification" is not required in order to vote. See Draft Article 115. Under these circumstances, the notification is of little utility. The same notification might be much more useful if sent immediately after voters are assigned to polling stations 25 days in advance of voting.

Consideration should be given to the anticipated amount of time for voters to vote pursuant to the proposed procedures. There may be 1000 to 1200 voters per polling station. See Draft Article 30. The polling station will be open for 14 hours -- from 7:00 until 21:00. See Draft Article 112. An assessment should be made as to whether or not all the procedures can be accomplished for this number of voters in the time allotted. If there is a risk that they cannot, consideration should be given to streamlining the procedures without lessening the integrity of the process or lowering the number of voters per polling station. For instance, the drafters should consider the practicality of the requirement in Draft Article 111 that the number of voters in the polling station not exceed the number of polling booths or screens. The drafters' goal of ensuring order in the polling station is praiseworthy. However, given the time that it will take for members of the election committee to check voters' identity, issue ballots, and have people sign the voter list, it may be necessary to allow additional voters in the polling station, so that some voters can be voting while others are going through the advance process.

The portion of Draft Article 111 explicitly authorizing accredited representatives of the media, domestic and foreign monitors to monitor the course of the voting is

excellent. This comports with Paragraph 8 of the Copenhagen Document and international standards more generally.

The Draft Law outlines a technique ("marking spray") to avoid double voting. See Draft Article 115. The exact nature of this technique should be specified along with its application. Draft Article 115 also provides that if voting for more than one election is to be conducted at a polling station (e.g., for the National Assembly and the Municipal Council or Assembly for the Autonomous Province or President), the voter would have to prove their identity for each of the elections. Draft Article 115 seems to contemplate separate but contemporaneous voting processes for each election taking place in a given electoral unit. Such provisions could unnecessarily complicate the system. The election committee should be able to issue multiple ballots, and voters able to fill out more than one ballot at a time and put the ballots in the correct ballot boxes. Further, Article 115 would be strengthened if it is expanded to include the following steps by members of the election committee: (1) checking for marking spray on the finger of voters, and (2) tearing the control coupon off of the ballot before handing the ballot to the voter and having him/her sign the voter list.

The Draft outlines two means of voting other than appearing personally at the polling station. It would be worthwhile to clarify the distinction between "absentee voting" (mobile polling) for those who are disabled on election day (Draft Article 119) and "voting by mail" for voters who know in advance that they will be traveling on election day (Draft Article 121). The first involves bringing ballots to voters on election day who properly notify election officials that they will be unable to travel to their assigned polling station to vote. See Draft Article 119. This type of procedure is relatively common. While such procedures increase access to the franchise, they also create an opportunity for abuse. Ways to guard against such abuse include requiring precinct election committee members conducting this procedure to be from opposing political parties and to authorize party representatives or nonpartisan observers to accompany the election officials delivering and returning the ballots. A reasonable advance notice of the need for such mobile voting should be required of voters as well.

The second type of procedure provides a mechanism for voters to receive and cast ballots by mail. See Draft Article 121. The provision outlining this procedure is positive and consistent with international standards. However, as a practical matter, it may be difficult to implement this option in the time available. Given the deadline for submitting candidate lists, consideration should be given as to whether there is adequate time to approve the lists, print ballots, distribute ballots by mail and for voters to return the cast ballots by mail before midnight on election day.

In general, the provisions in the Draft regarding counting and processing the ballots are sensible, detailed and designed to insure the integrity of the process. However, it is overly stringent to mandate that, if the number of ballots in a ballot box exceeds even by one the number of voters who voted at that polling station, the results of the voting at that station must be disregarded and voting at that station must be repeated. See Draft Article 124. While such a discrepancy would be troubling, it is possible that it

could result from a minor error. Moreover, if the discrepancy were very small, it would be unlikely to have an effect on the outcome of the election. On the other hand, requiring a mandatory repeat of the election could be very costly, time-consuming and contentious. Alternative solutions would be to set a threshold of discrepancies over which repeat voting would be required, but below which specific notice of the discrepancy must be made. A deminimis number and a rule concerning whether the number would affect an electoral outcome should be considered. Decisions about repeat voting then would be made by the supervising MEC, with such decisions to be reviewed by the REC or PEC as appropriate.

Chapter XIII – Verification of Polling Results

The Draft outlines an orderly and effective method for verifying the election results and framing any issues for appeal. The Draft allows supervising Commissions discretion to assess whether there was evidence of irregularity such that a repeat election at a polling station is appropriate. See Draft Articles 128 & 130. One unusual basis for establishing irregularity is if there was "marked inequality in the way the media treated the candidates." See Draft Article 130. This would entail the application of a very subjective standard, arguably in the face of the expressed will of the electorate. In practice, the provision is very unlikely to be used but is likely to be deemed very controversial if employed. An alternative would be to provide effective remedies for verified examples unequal media treatment, such as mandatory compensatory time on state controlled media, right of reply and right of correction. Inequality in media treatment then could be one of several factors considered in verifying results.

There appear to be no provisions in the Draft Law regarding the public posting of reports (protocols) concerning election results. The transparency of the electoral process would be greatly increased if provisions were included to mandate posting of results outside individual polling stations, as well as the posting of consolidated results outside each election commission office. In addition, based on international best practices, the Draft Law should include requirements that copies of the results (protocols) be provided to political party representatives and nonpartisan election monitors who request them.

Chapter XIV – Communication Between Executive Electoral Organs and Parties

No comments were deemed necessary for this Chapter.

Chapter XV – Violations of the Electoral Rights and the Electoral Procedure

The provisions in Draft Article 143 allow for the Electoral Commission to annul the results of voting only in cases where "violations were of such a nature that they had a significant impact on the results of the voting" and that any such decision must be approved by a two-thirds majority of the election commission. These provisions are sound. The drafters may want to reconsider the three conditions under which the *electoral committee* is obliged to annul voting, particularly the instance in which "the number of ballot papers in the ballot box exceeds the number of voters who actually

voted." As noted above, while a situation in which the number of ballots cast greatly exceeds the number of voters who voted would be of grave concern, the Draft Law as written does not allow for the possibility of minor counting errors, and therefore minor discrepancies between these numbers. Provisions should be crafted that allow for the annulment of voting results only in situations in which the discrepancy could have affected the overall outcome of the vote.

Chapter XVI – Legal Remedies

Draft Article 148 provides that if a complaint is filed through the electoral commission of the first instance, the complaint and any documents shall be provided to the electoral commission of the second instance "without delay." It is unclear what would constitute "delay;" to ensure that subjective determinations are avoided, it may be advisable to assign a specific period of time, such as 24 or 48 hours. The Draft Law does not provide a basis for legal action or remedies for candidates. There are instances where candidates may have interests separate from their political parties. Consideration for adding provisions for candidates therefore seems warranted.

Chapter XVII – Verification of Mandates and Termination of Mandates

The verification of mandates procedure set forth in Draft Articles 152 through 159 seems very complicated and cumbersome. The drafters should consider carefully whether such a process is necessary and, if it is, should seek ways to simplify it.

As noted in the comments on Chapter 1, Draft Article 161 and Draft Article 5 may be contradictory. If Draft Article 161 is taken to mean that a Deputy or Councilor's mandate will be terminated when their party membership ceases, whether voluntarily or involuntarily, this would be antithetical to the requirement in Draft Article 5 that "Deputies and Councilors decide and vote freely and according to their own beliefs." These provisions must be reconciled.

Further, the interplay between Draft Articles 162 and 163 is unclear. Draft Article 162 sets forth a system by which, when a mandate (or seat) becomes vacant, the position is to be filled by the next appropriate candidate on the original electoral list. If there are no more candidates on that electoral list, the mandate remains vacant until the next election. This is difficult to reconcile with Draft Article 163, which requires that supplementary elections be requested within 30 days of a seat becoming vacant if no substitute candidate is nominated. This apparent contradiction should be addressed, with an eye to minimizing the possibility of numerous, costly supplementary elections.

Chapter XVIII – Election Costs

No comments were deemed necessary for this Chapter.

Chapter XIX – Electoral Offenses

The Draft Law includes a note indicating that the Drafters are of the opinion that electoral offenses and the resulting penalties should not be included in the Law. This is not necessarily the best approach, although, there is not a universal practice regarding this issue. Special offenses relating to elections are often included in the electoral law in the interest of creating a full electoral framework with well-defined accountability. There was an insufficient basis for the present commentary to consider whether the penalties delineated are appropriate, but the creation of transparent, objective guidelines for election related behavior is a worthwhile endeavor. There, however, is basis for concern that the provisions regarding media offenses, particularly the prohibition against "exceptionally favoring certain parties or candidates" in Article 170 are too vague.

Chapter XX – Election Monitors

The provisions regarding domestic and international monitors are very strong. The law should specify the bases for refusing authorization to observe the election process under Draft Article 174 and should require that the basis for each denial be provided in writing, with a possibility for appealing the decision. Chapter XX should include the media as eligible to monitor, as the Draft Law so states in Draft Article 111. In addition, the provisions should make clear that monitors may observe every aspect of the election process during the "course of the elections" to ensure that electoral authorities do not arbitrarily limit access to important elements, such as the proper function of computer programs involved in creating the voter lists and tabulation of electoral results, printing of ballots and security of ballot distribution.

Please note that Articles 178-185 were not included in the Draft Law submitted for this commentary.

Chapter XXI – Coming Into Effect

No comments were deemed necessary for this Chapter.

Conclusion

It is the right of citizens to participate in governmental affairs, directly or through freely chosen representatives. Indeed, the authority of any democratic government is derived from the will of its people expressed in genuine elections, and a proper legal framework is a critical component of ensuring electoral integrity. By developing the Draft Law, CeSID has not only exercised the right to participate in public affairs. It has made important contributions to the substantive debate. Through an open political process, such positive contributions of citizen groups should have a substantial impact.

NDI is please to have been called on to offer comments on the Draft Law. As noted in the Overview, the Draft as it stands reflects well international norms and standards. It is hoped that the comments offered here may contribute to its further development and ultimately to the overall development of the electoral framework.