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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS**  
**(OSCE/ODIHR)**

**SERBIA**

**JOINT OPINION**

**ON THE CONSTITUTIONAL AND LEGAL FRAMEWORK  
GOVERNING THE FUNCTIONING OF DEMOCRATIC INSTITUTIONS**

**ELECTORAL LAW AND ELECTORAL ADMINISTRATION**

**Approved by the Council for Democratic Elections  
at its 75th meeting (Venice, 15 December 2022)  
and adopted by the Venice Commission  
at its 133rd Plenary Session (Venice, 16-17 December 2022)**

**On the basis of comments by**

**Mr Eirik HOLMØYVIK (Member, Norway)**  
**Mr Oliver KASK (Substitute member, Estonia)**  
**Mr Oscar SÁNCHEZ MUÑOZ (Substitute member, Spain)**  
**Ms Elena KOVALYOVA (Expert, OSCE/ODIHR)**

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## I. Introduction

1. By letter of 18 November 2021, Mr Michael Astrup Jensen, Chairperson of the Parliamentary Assembly Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), asked for an opinion of the Venice Commission on “the constitutional and legal framework governing the functioning of democratic institutions in Serbia”. As this opinion relates to the electoral field, it was prepared jointly by the Venice Commission and ODIHR.

2. The Venice Commission and ODIHR already addressed several elements of the constitutional and legal framework in question in two urgent opinions delivered in 2021 on the draft law on the Referendum and the People’s initiative.<sup>1</sup>

3. The Venice Commission also addressed other aspects of the functioning of institutions in Serbia in its opinions on the draft constitutional amendments on the judiciary (2021)<sup>2</sup> as well as three draft laws implementing the Constitution with regard to the judiciary (2022).<sup>3</sup> In addition to this opinion, the Venice Commission is preparing for the December 2022 session an opinion on two draft Laws implementing the Constitutional Amendments of the Prosecution service and a follow-up opinion on the three laws on the judiciary.

4. The present opinion will focus on the legislation applicable to elections, and its implementation, whose conformity with international standards is central to ensuring the functioning of democratic institutions (see chapter II on the scope of the opinion).

5. Mr Eirik Holmøyvik, Mr Oliver Kask and Mr Oscar Sánchez Muñoz acted as rapporteurs for this opinion. Ms Elena Kovalyova was appointed as the expert for ODIHR.

6. On 17-18 November 2022, a joint delegation composed of Mr Holmøyvik and Mr Sánchez Muñoz for the Venice Commission, accompanied by Mr Garrone from the Venice Commission secretariat and Mr Goran Petrov from the OSCE/ODIHR, travelled to Serbia and had meetings with the Republic Electoral Committee, the Speaker of the National Assembly, Parliamentary Groups and independent MPs, the Prime Minister’s Office, the Ministry of Justice, the Ministry of Public Administration and Local Self Government and the Ministry of Finance, the Administrative Court, the Regulatory Authority for Electronic Media, the Agency for Prevention of Corruption, the civil society and the international community. In addition, the delegation met with the representatives of the government’s Working Group for Cooperation with the OSCE and ODIHR in the Coordination and Monitoring of the Implementation of Recommendations for the Improvement of the Election Process. This joint opinion takes into account the information obtained during the above-mentioned visit. The Venice Commission and ODIHR are grateful to the Serbian authorities for the excellent organisation of this visit.

7. This opinion was prepared based on the English translation of the electoral legislation. The translation may not accurately reflect the original version on all points.

8. This opinion was drafted on the basis of comments by the rapporteurs and the results of the meetings on 17-18 November. It was approved by the Council for Democratic Elections at its

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<sup>1</sup> Venice Commission, [CDL-AD\(2021\)033](#), Serbia - Urgent opinion on the draft law on the referendum and the people's initiative; [CDL-AD\(2021\)052](#), Serbia - Urgent opinion on the revised draft Law on the Referendum and the People's Initiative.

<sup>2</sup> Venice Commission, [CDL-AD\(2021\)032](#), Serbia - Opinion on the draft Constitutional Amendments on the Judiciary and draft Constitutional Law for the Implementation of the Constitutional Amendments; [CDL-AD\(2021\)048](#), Urgent opinion on the revised draft constitutional amendments on the judiciary.

<sup>3</sup> Venice Commission, [CDL-AD\(2022\)030](#), Serbia - Opinion on three draft laws implementing the constitutional amendments on Judiciary.

75th meeting (Venice, 15 December 2022), and, following an exchange of views with Mr Vladimir Orlić, Speaker of the National Assembly of Serbia, it was adopted by the Venice Commission at its 133rd Plenary Session (Venice, 16-17 December 2022).

## II. Background and scope of the joint opinion

9. The present request differs from those previously made by the Parliamentary Assembly to the Venice Commission by its broad character and the focus on the “functioning of the institutions”, while the Venice Commission and ODIHR, when providing legal opinions or joint opinions, normally assess constitutional and legal texts and not their implementation. The Venice Commission has considered, in consultation with the Assembly, that this request should be interpreted to cover the electoral framework, including the way in which elections are held and the exercise of freedom of association, assembly and expression in connection with them, as well as the process of preparation and holding of the recent constitutional and ongoing legislative reforms relating to the judiciary (mentioned in chapter I). The present joint opinion, therefore, considers the Serbian electoral legislation in the broader sense and focuses mostly on the following five pieces of legislation:

- The Law on the election of members of parliament ([CDL-REF\(2022\)051](#)) (LEMP)
- The Law on the election of the President of the Republic ([CDL-REF\(2022\)053](#)) (LEPR)
- The Law on local elections ([CDL-REF\(2022\)054](#)) (LLE)
- The Law on the unified voter register ([CDL-REF\(2022\)055](#)) (LUVR)
- The Law on financing political activities ([CDL-REF\(2022\)056](#)) (LFPA)

10. Other legal acts have been considered to the extent necessary to establish the regulatory context in which the primary laws are implemented and to identify possible legal gaps and inconsistencies, and contradictory regulations. However, these acts have not been examined comprehensively.

11. ODIHR and the Venice Commission have consistently expressed the view that any successful changes to electoral legislation should be built on at least the following three essential elements:

- 1) clear and comprehensive legislation that meets international obligations and standards and addresses prior recommendations;
- 2) the adoption of legislation by broad consensus after extensive public consultations with all relevant stakeholders; and
- 3) the political commitment to fully implement such legislation in good faith, with adequate procedural and judicial safeguards and means by which to timely evaluate any alleged failure to do so.

12. International obligations and standards include not only the basic principles of the European electoral heritage (universal, equal, free, secret and direct suffrage, elections held in reasonable and foreseeable intervals) but also framework conditions for implementing these principles, such as 1) respect for fundamental rights, 2) regulatory levels and stability of electoral law, 3) procedural guarantees, including the organisation of elections by an independent and impartial body, observation of elections, and an effective system of appeal.<sup>4</sup>

13. In this opinion, which is related to “the functioning of democratic institutions”, the Venice Commission and ODIHR will address these three aspects. While concentrating largely on assessing the content of the legislation, they will also address several aspects of the reform process.

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<sup>4</sup> Venice Commission, Code of Good Practice in Electoral Matters, [CDL-AD\(2002\)023rev2-cor](#)

14. The opinion does not constitute a full and comprehensive review of the entire legal and institutional framework governing elections in Serbia. Instead, it focuses on the most important aspects of electoral legislation. ODIHR and the Venice Commission would like to note that this joint opinion does not prevent them from formulating additional written or oral recommendations or comments on the respective legal acts or related legislation of Serbia in the future.

15. The implementation of the legislation will be assessed with reference to the Parliamentary Assembly of the Council of Europe's and the ODIHR's election observation reports of the early parliamentary and presidential 2022 elections.<sup>5</sup> These reports noted several shortcomings which led to breaches of the right to free elections as guaranteed by Article 52 of the Constitution of Serbia, Article 3 of the First Additional Protocol to the European Convention on Human Rights (ECHR), Article 25 of the 1966 ICCPR, as OSCE commitments as defined in paragraphs 5.1 – 5.4 and paragraph 7 of the 1990 OSCE Copenhagen Document and the Venice Commission Code of good practice in electoral matters. The International Election Observation Mission for the 3 April 2022 elections, which the Parliamentary Assembly of the Council of Europe joined, concluded that "a number of shortcomings resulted in an uneven playing field, favouring the incumbents. While fundamental freedoms were largely respected during the campaign, the combined impact of unbalanced access to media, undue pressure on public sector employees to support the incumbents, significant campaign finance disparities and misuse of administrative resources led to unequal conditions for contestants." It further noted that "Election Day was smoothly conducted and peaceful overall but, despite solid preparations, was marked by a number of systematic procedural deficiencies related to polling station layout, overcrowding, breaches in the secrecy of the vote and numerous instances of family voting." Some indications of serious irregularities were also observed, and the IEOM report states that "Instances of unauthorized persons keeping track of voters, voters taking pictures of their ballots and same persons assisting multiple voters when voting were observed in some polling stations." All these practices are already prohibited, but more severe sanctions could be envisaged. It is, however, more important to implement the existing provisions rather than to introduce additional regulations that may not be implemented.

16. The present review does not present an exhaustive overview of shortcomings in the implementation of the current legal framework. The Venice Commission and ODIHR nonetheless stress that the suggested improvements in the legal framework should be accompanied or promptly followed-up by decisive improvements in implementation. For the rest, they will refer to the reports on the observation of elections, and they recommend following their recommendations. It will belong to the Parliamentary Assembly to make the political assessment of compliance of Serbia with its commitments towards the Council of Europe.

17. Eventually, this opinion will shortly address the follow-up to the latest Venice Commission's opinion on the legislation on referendums and people's initiatives.<sup>6</sup>

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<sup>5</sup> Parliamentary Assembly of the Council of Europe (PACE) – [Observation of the early parliamentary and presidential elections in Serbia \(3 April 2022\)](#); ODIHR Election Observation Mission, Final Report, Presidential and Early Parliamentary Elections, 3 April 2022, to be found at ODIHR Election Observation Mission, [Final Report](#), Presidential and Early Parliamentary Elections.

<sup>6</sup> [CDL-AD\(2021\)052](#), Serbia - Urgent opinion on the revised draft Law on the Referendum and the People's Initiative.

### III. Executive summary

18. The scope of the present opinion is to address the legislation of the Republic of Serbia in the election-related field as well as its implementation.

19. The Venice Commission and ODIHR note that the most recent process for amending the legislation under consideration was generally inclusive and led to a significant revision of the legal framework on 4 February 2022, that is less than two months before the elections. To prevent a late adoption of amendments in the future, they recommend that the Serbian authorities evaluate the electoral framework after each election and, when needed, establish a system for preparation, consultation, and adoption of amendments to electoral legislation well before the next elections.

20. Concerning the substance of the legislation, the Venice Commission and ODIHR make the following key recommendations:

- A. On the composition and functioning of electoral administration: strengthening the professional background and expertise of its members, the balance between the parties supporting the government and the opposition and considering the possible inclusion of independent members who are not directly appointed by the parties or who require a broad consensus for their nomination; reviewing the justification and function of the extended composition.
- B. Ensuring efficient monitoring of the media by clarifying the scope of action and competences of the different monitoring bodies; offering clear and objective criteria for decisions on the selection of media outlets for media monitoring; determining the monitoring methodology in a transparent process; extending monitoring to information on state officials; ensuring transparency of monitoring results; combining ex-post and ex-ante supervision; streamlining sanctioning procedures.
- C. Ensuring the transparency of all election-related online communications and, at the same time, ensuring that the cost of these activities is taken into account for the purpose of enforcing political finance regulations.
- D. On campaign financing, improving the oversight mechanism through comprehensive control of fundraising and expenditures, identification of unlawful practices and proportionate and effective sanctioning of violations, as well as introducing campaign expenditure limits; providing for the distribution of public funds before the start of the campaign; regulating the election-related communication activities of third parties that entail expenditure. Sections of the law on campaign finance should be reviewed to ensure clarity and removal of ambiguous formulations, in particular for the norms that impose obligations on contestants and oversight bodies.
- E. Undertaking wide-scope measures to prevent misuse of office and state resources, including a detailed regulation of such practices, the provision for mechanisms of compliance and enforcement, and the provision for proportionate and dissuasive sanctions.
- F. Considering measures to promote internal political party democracy and to provide opportunities for participation that are not unduly limited by the party leadership, such as reviewing existing requirements for internal democracy within political parties and assessing the impact of the electoral system on political participation and possible measures to mitigate this impact;
- G. Adjusting the various dispute resolution mechanisms and related deadlines to streamline the determination of election results by the Republic Electoral Commission; extending the jurisdiction of the relevant courts to include all types of interference with MPs' mandates irrespective of its legal basis and classification.

21. Furthermore, the Venice Commission and ODIHR recommend:

- A. Considering a consolidation of the election-related legislation, with common general rules and exceptions where required by the specificities of each type of election, eliminating unnecessary repetitions of norms while identifying and eliminating legal gaps and inconsistencies.
- B. Deleting from the Constitution the notion of “working ability” as a condition for suffrage rights; removing the restrictions on suffrage rights based on intellectual and psychosocial disabilities.
- C. Harmonising the laws on the Unified Voter Register and on Personal Data Protection, which should detail the scope of personal data of voters made public, and the secure and lawful access to these data; considering the establishment of a mechanism for independent external monitoring of the registration of voters, by the Republic Electoral Commission or an impartial ad hoc body with a clear mandate; considering the conduct of an independent audit of the Unified Voter Register; notifying any removal from the voters’ lists to the concerned persons;
- D. Ensuring proper training of local electoral commissions (LECs) and polling boards (PBs).
- E. Requiring the publication of the Agency for Prevention of Corruption campaign observers’ reports.
- F. Providing for more objective and clear criteria to grant national minority status to electoral lists.
- G. Adapting the legislation and taking further steps to ensure the proper implementation of the law so that the requirement to repeat voting in individual polling stations does not block the proclamation of the final results and the establishment of the next convocation of the parliament. This could be achieved by reviewing provisions related to when and if the repeat voting takes place, holding all repeated elections simultaneously and only in case they impact election results, setting uniform deadlines for establishing results, and strengthening the mechanisms to prevent significant violations of the process of voting, including of repeat voting (avoid repeating more than once).

22. To enable a more level playing field in the elections, the Venice Commission and ODIHR further recommend that Article 109 of the Constitution be interpreted in the sense that the President only dissolves parliament on the basis of a well elaborated proposal and preferably only when necessary due to the parliamentary situation, thus limiting recourse to early elections. To further the constitutional aim of a strong parliamentary system where the president expresses state unity and performs a neutral function in government formation, additional measures could be considered to limit the influence of the presidential election campaign over the parliamentary race. Further safeguards should also be considered to prevent the misuse of public office and administrative resources in the election campaign.

23. The political commitment to fully implement electoral legislation in good faith is crucial to ensure the holding of democratic elections. In this regard, a number of improvements in electoral practice are still to take place. The Venice Commission and ODIHR refer to the recommendations made by the Parliamentary Assembly of the Council of Europe and ODIHR in their election reports following the 3 April 2022 elections in the Republic of Serbia and recommend their implementation. In particular:

- A. A number of behaviours which are prohibited by law persist (voter intimidation, vote buying, systemic deficiencies related to polling station layout, leading to overcrowding and numerous breaches of the secrecy of the vote and family voting). The authorities should take the necessary measures for them to come to an end, including through stronger sanctions;
- B. The effectiveness of the media-monitoring bodies and those in charge of the control of political financing, including the Agency for Prevention of Corruption, should be ensured not only in law but also in practice.

C. The conduct of an independent audit of the Unified Voter Register should be considered;

24. Concerning the legislation on referendums, the main recommendations of the 2021 Venice Commission opinion, to abolish the fees for signature authentication, give the electoral commissions the power to check signatures and to provide objective information to voters, were followed. Some recommendations, however, remain to be addressed, in particular, to extend the right to appeal to all voters.

25. Additional recommendations are included throughout the text of this joint opinion.

26. The Venice Commission and ODIHR remain at the disposal of the Serbian authorities and the Parliamentary Assembly for further assistance in this matter.

#### **IV. Legislative process and technique**

##### **A. Legislative process**

27. Most opposition parties boycotted the parliamentary election held in June 2020, citing that this election was held despite the health risks posed by the COVID-19 pandemic and for the alleged lack of democratic standards for the conduct of the election campaign and its coverage in the media as the reasons for the boycott.<sup>7</sup> Apart from leading to the exclusion of the main opposition parties from the Parliament, the boycott also led to the exclusion of the opposition from being able to participate fully in the permanent compositions of electoral commissions (until agreement on the inclusion of extra-parliamentary opposition in EMBs was reached) or to participate in parliamentary commissions that nominate membership to bodies such as the Regulatory Authority for Electronic Media (REM), which is regrettable.

28. The Venice Commission and ODIHR would like to stress the importance of the role of the opposition in a democratic society. They recall Resolution 1601(2008) of the Parliamentary Assembly of the Council of Europe on procedural guidelines on the rights and responsibilities of the opposition in a democratic parliament:

*“3. A political opposition in and outside parliament is an essential component of a well-functioning democracy. One of the main functions of the opposition is to offer a reliable political alternative to the majority in power by providing other policy options for public consideration. By overseeing and criticising the work of the ruling government, continuously evaluating government action and holding the government to account, the opposition works to ensure transparency of public decisions and efficiency in the management of public affairs, thereby ensuring the defence of the public interest and preventing misuse and dysfunction.”*

29. The issue was later addressed by the Venice Commission in its Report on the role of the opposition in a democratic parliament:

*“149. In a well-functioning parliamentary democracy, there is a balance between the majority and the minority, which creates a form of inter-play that ensures effective, democratic and legitimate governance. This cannot be taken for granted, and there are many countries also within Europe that present a different picture. There are at least two main forms of abuse or dysfunction of the role of the opposition. Either the opposition completely blocks effective governmental work and/or effective parliamentary work, or the opposition does not offer any alternatives to the work of the government and/or to the proposals of the parliamentary majority and is therefore not visible in the political debate.”<sup>8</sup>*

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<sup>7</sup> <https://freedomhouse.org/country/serbia/freedom-world/2021>.

<sup>8</sup> Venice Commission, Report on the role of the opposition in a democratic Parliament, [CDL-AD\(2010\)025](#), para. 149, quoted by [CDL-AD\(2021\)032](#), Opinion on the draft Constitutional Amendments on the Judiciary and draft Constitutional Law for the Implementation of the Constitutional Amendments; see also [Resolution 1601\(2008\)](#) of the Parliamentary Assembly of the Council of Europe



30. In order to put an end to the deadlock, an inter-party dialogue process between the government and opposition, mediated by members of the European Parliament, resulted in the adoption on 18 September 2021 of a number of measures aimed at improving the electoral process. A second dialogue was launched under the auspices of the speaker of the parliament, held in parallel without foreign mediation, and led to an agreement on 29 October. While a number of opposition parties expressed dissatisfaction with the dialogue processes and considered the outcomes limited, all of them decided to participate in these elections”.<sup>9</sup> And even though some stakeholders felt the changes were introduced too close to the elections, it must be underlined that the process was inclusive and led to broad agreement on a significant revision of the legal framework in February 2022, which in turn enabled the participation of the opposition not only in the electoral process but also in the election administration.

31. Amendments to the LEMP extended the permanent composition of the Republic Electoral Commission (REC) to temporarily include the representatives of the extra-parliamentary opposition (only for the April 2022 elections) as well as new intermediate electoral management bodies, the local electoral commissions (LECs). Amendments to core elements of the electoral legal framework should, in principle, be avoided in the year preceding the elections since this could be intended or perceived as protecting narrow party interests and election results of the ruling party, even when no manipulation is intended; however, they are acceptable when intended to ensure conformity with the standards of the European electoral heritage and consensual like in the present case.<sup>10</sup> Even when amendments are in line with international recommendations, another requirement is that “any reform of electoral legislation to be applied during an election should occur early enough for it to be really applicable to the election”.<sup>11</sup> Difficulties which arose during the 2022 elections put doubts on the fulfilment of that condition. For example, the late introduction of LECs made election dispute resolution more complex for voters and candidates and also made it less likely that these would be trained to professional standards. Indeed, studies of the LECs in the 2022 elections indicate uneven performance.<sup>12</sup> For the 2020 parliamentary elections, too, amendments to the electoral legislation were made shortly before the elections. To prevent a repetition of late amendments, which makes consensus more difficult and reduces trust in democratic processes, the Venice Commission and ODIHR recommend that the Serbian authorities evaluate the electoral framework promptly after each election and, when needed, establish a system for preparation, consultation, and adoption of amendments to electoral legislation well before the next election.

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on procedural guidelines on the rights and responsibilities of the opposition in a democratic parliament. The ODIHR and the Venice Commission Joint Guidelines on Political Party Regulation, para. 125, highlights the fundamental role of the opposition and states that: “the rights of the opposition must be protected against transgressions by either the executive or the parliamentary majority. While the opposition should not have an unbridled right to prevent the majority from implementing its priorities, it still needs to be heard and protected, so as to complement the role of the majority in Parliament, and ensure proper oversight and effective debates, as a way of informing the public of alternative viewpoints”.

<sup>9</sup> PACE, Election observation report of the early parliamentary and presidential elections in Serbia (3 April 2022), para. 9.

<sup>10</sup> Venice Commission, Code of Good Practice in Electoral Matters, [CDL-AD\(2002\)023rev2-cor](#), II.2.b; Interpretative Declaration on the Stability of Electoral Law, [CDL-AD\(2005\)043](#). On previous recommendations, see already Venice Commission and ODIHR, [CDL-AD\(2006\)013](#), Joint recommendations on the laws on parliamentary, presidential and local elections, and electoral administration in the Republic of Serbia, para. 18.

<sup>11</sup> [CDL-AD\(2005\)043](#), II.5.

<sup>12</sup> See CeSID, Election disputes in Serbia, April 2022 elections, p. 26-27.

## **B. Legislative technique**

32. The current electoral legal framework in Serbia consists of three separate laws for parliamentary, presidential, and local elections, as well as laws on the financing of political activities and other legal rules of general nature, such as the Constitution and the law on public information and the media. This may confuse both the voters and the EMs, lead to a number of repetitions and difficulties in conducting training and have negative impacts on the trust in electoral processes. The Venice Commission and ODIHR recommend considering consolidation and harmonisation of the three laws into one, with common general rules and exceptions where required by the specificities of each type of election. This may strengthen the coherence of the legal framework as a whole.

## **V. Analysis and Recommendations**

### **A. Right to vote and to be elected**

33. Article 52 of the Constitution of Serbia guarantees the right to vote and to be elected for “Every citizen of age and working ability”. It is unclear what “working ability” may refer to and could be interpreted to relate to various issues. The term is vague and broad and should be deleted from Article 52 of the Constitution, in line with the international standards to allow for maximum passive and active voting rights (see also paragraph 34 of this opinion).

#### **1. Persons with disabilities**

34. In the laws on parliamentary, presidential and local elections, persons “wholly divested of legal capacity” are deprived of the right to vote.<sup>13</sup> Persons “partly divested of legal capacity” may vote “unless a court has declared him/her incapable of exercising the right to vote under the decision on partial deprivation of legal capacity.”

35. Restrictions on the right to vote due to psychosocial and intellectual disabilities raise human rights issues in relation to the principle of universal suffrage. Such restrictions may be in line with the case-law of the European Court of Human Rights, based on Article 3 Protocol 1 to the European Convention on Human Rights.<sup>14</sup> For that to be so, disenfranchisement must be possible only after individual judicial evaluation and according to a legal framework respecting the principle of proportionality. However, any restriction on the right to vote due to mental capacity is at odds with Article 29 of the Convention on the Rights of Persons with Disabilities (CRPD), according to the interpretation of the UN Committee on the Rights of Persons with Disabilities.<sup>15</sup> This convention is ratified by the Republic of Serbia without reservations. The Venice

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<sup>13</sup> Article 3 of the Law on the Election of Members of Parliament; Law on the Election of the President of the Republic; Law on Local Elections.

<sup>14</sup> See in particular *Strøbye and Rosenlind v. Denmark*, nos. 25802/18 and 27338/18, 2 February 2021, paras 112-120, and *Alajos Kiss v. Hungary*, no. 38832/06, 20 May 2010.

<sup>15</sup> According to Articles 12 and 29 of the CRPD, “State Parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life” and ensure their “right and opportunity [...] to vote and be elected”. Paragraph 48 of the General Comment to Article 12 of the CRPD states that “a person’s decision-making ability cannot be justification for any exclusion of persons with disabilities from exercising [...] the right to vote [and] the right to stand for election”. See also Paragraph 9.4 of the Communication No. 4/2011 of the Committee on the Rights of Persons with Disabilities (16 October 2013); Recommendation [CM/Rec\(2011\)14](#) of the Committee of Ministers to member states on the participation of persons with disabilities in political and public life, item 3; and ODIHR, [Guidelines on Promoting the Political Participation of Persons with Disabilities](#) (Warsaw: 2019), especially p. 36.

Commission and ODIHR, therefore, recommend that the restrictions on suffrage rights based on intellectual or psychosocial disabilities be reconsidered in line with international obligations.<sup>16</sup>

## 2. Political rights of foreign residents in local elections

36. Article 3 LLE confers the right to vote and to stand as a candidate to “every adult citizen of the Republic of Serbia”. Article 52 of the Constitution states that “Every citizen of age and working ability of the Republic of Serbia shall have the right to vote and be elected’ without providing for any exceptions for local elections.

37. The Code of good practice in electoral matters admits that suffrage may be conditioned by the nationality requirement. “However, it would be advisable for foreigners to be allowed to vote in local elections after a certain period of residence”.<sup>17</sup> Both the Congress of Local and Regional Authorities and ODIHR have pointed to the desirable enfranchisement of long-term foreign residents.<sup>18</sup> Several election reports refer to “an emerging trend to grant voting rights for local elections to long-term residents who are not citizens”.<sup>19</sup> The Venice Commission and ODIHR recommend considering the extension of the right to vote and to be elected in local elections to long-term foreign residents.

## 3. Voters lists

38. The Unified Voter Register (UVR) is a permanent database maintained electronically by the Ministry of Public Administration and Local Self-Government (MPALSG) and updated on the basis of municipal records, input by other state institutions, and voters’ requests for corrections. This model is conducive to ensuring the accuracy of the voter registers, although voter registration conducted or at least controlled or supervised by an independent management body may be a better solution to ensure voter inclusiveness and give electoral registers greater credibility with the public.

39. Article 11 of the Law on the Unified Voter Register (LUVR) allows for *ex officio* amendments to the voter register based on the residence data provided by the Ministry of Interior. In certain cases, the police may establish that a citizen does not permanently reside at a particular address and, as a part of an administrative procedure, this results in his or her exclusion from the permanent register, and, subsequently, he or she is automatically removed from the voter register. While the LUVR prescribes permanent residence as a prerequisite for inclusion in the voter register, the constitution and LEMP (and other election laws) do not include such a requirement. Some election stakeholders indicated that the removal of voters from voter lists due to lack of permanent residence might negatively affect minority voters. The Venice Commission and ODIHR recommend that the LUVR be harmonised with the constitution, the LEMP, and other election laws. Further, at any juncture, if the *ex officio* removal of a voter from the voter register is permitted by law, the law should further prescribe how it is documented by election authorities, what information the citizen is provided and ensure that all removals are based on reasonable, objective and non-discriminatory criteria.

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<sup>16</sup> Cf. Resolution 2155 (2017) of the Council of Europe Parliamentary Assembly, about “The political rights of persons with disabilities: a democratic issue”, recalling Resolution 2039 (2015); PACE Observation mission report, 3 April 2022, para. 21.

<sup>17</sup> Venice Commission, CDL-AD(2002)023rev2-cor, Code of good practice in electoral matters, para. I.1.1.b.ii.

<sup>18</sup> See, for example, Congress of Local and Regional Authorities, Municipal elections in “The former Yugoslav Republic of Macedonia” (24 March 2013), 31 October 2013, para. 46; ODIHR Election Observation Mission Final Report, Local Elections, Republic of Albania, 21 June 2015, p. 26.

<sup>19</sup> See, for example, ODIHR Needs Assessment Mission Report, Presidential Election, Republic of Austria, 24 April 2016 and ODIHR Needs Assessment Mission Report, Parliamentary Elections, Principality of Andorra, 1 March 2015.

40. According to information provided during the mission to Belgrade, some persons were excluded from the voter register without being informed about the exclusion. The Venice Commission and ODIHR recommend that if a voter is removed *ex officio* from the list, the MPALSG should make every attempt to notify the concerned citizens of the exclusion to enable them to introduce a complaint on time or supply to the election authorities the information required to be reinstated.

41. Election observation missions, including the most recent ones in 2022, have consistently revealed a high level of public mistrust of the accuracy of the voter lists, due in particular to the continued presence of entries of deceased persons.<sup>20</sup>

42. For the purpose of parliamentary and presidential elections, the Republic of Serbia is one electoral constituency, and the place of registration of voters does not play a role. For local elections, the law does not introduce any restrictions in terms of re-registration of voters' permanent addresses to another municipality shortly prior to elections (Article 24.3 of the LUVR states that the provisions of this law apply accordingly to local elections). During the visit of the delegation, some election stakeholders alleged that some voters belonging to national minorities (particularly among Roma) were included in the voter lists in Belgrade and some other larger cities in a coordinated fashion. Stricter supervision of voters lists or introducing a reasonable length of residency requirement that affects only the voters in local elections could be considered.<sup>21</sup>

43. The major concern is that the data contained in the voter register should be accurate and credible and ensure inclusiveness. To this end, the main quality control measure is public scrutiny. However, this guarantee of transparency may conflict with personal data protection legislation. Recently, some progress has been made in increasing the transparency of the voter registration process, effectively addressing some of the prior ODIHR recommendations. While LUVR and the law of Personal Data Protection are yet to be fully harmonised, and the latter law was previously cited as the reason for not publishing voter lists for public scrutiny, the MPALSG has, in advance of the April 2022 elections, amended their bylaws to increase transparency. Namely, all precinct voter lists were made accessible for online scrutiny for the first time during national elections, and the ministry also published the voter registration totals. The Venice Commission and ODIHR encourage the election authorities to introduce these transparency measures in the primary legislation, i.e., the LUVR.

44. By a decision of 18 November 2021, the government established an interparty working group to scrutinise the unified voter register. In advance of the April 2022 elections, some members of the group informed the ODIHR election observation mission that the limited mandate of the entity did not provide a clear objective of the goals of the working group, a timeframe, and conditions for meaningful scrutiny. Some opposition representatives stepped down from the working group before election day, citing a lack of a clear mandate, meaningful engagement of all stakeholders and sufficient resources.

45. The Venice Commission and ODIHR, therefore, recommend (1) fully harmonising the laws on the Unified Voter Register and on Personal Data Protection, which should detail the scope of personal data of voters made public, and the secure and lawful access to these data; (2) considering the establishment of a mechanism for independent external monitoring of the registration of voters, by the REC or an ad hoc body with a clear mandate; (3) addressing concerns over the accuracy of voter lists, considering the conduct of an independent audit of the Unified Voter Register.

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<sup>20</sup> PACE Election observation report of the early parliamentary and presidential elections in Serbia (3 April 2022), para. 22.

<sup>21</sup> See CDL-AD(2002)023rev2-cor, Code of Good Practice in Electoral Matters, guideline I.1.1.c.iii, which suggests it may be acceptable to impose a length of residence requirement for local elections.

## **B. Election administration**

### **1. Composition of Electoral Commissions and Polling Boards**

46. Main concerns about the composition of the election management bodies (EMBs) are related to their impartiality and independence. Reports of the recent international election observation missions support this finding, as the EMBs have not been able to prevent voter intimidation and pressure on voters in polling stations and to build the general trust of the electorate in the electoral processes.

47. Compliance with the obligation under Article 3 of Protocol No. 1 of the ECHR is interpreted by the ECtHR as the requirement to ensure that the election administration bodies “function in a transparent manner and [...] maintain impartiality and independence from political manipulation”, which constitute an essential element of the regularity of and trust in the electoral process.<sup>22</sup> The Code of Good Practice in Electoral Matters contains similar independence and impartiality requirements.<sup>23</sup> Only transparency, impartiality and independence from politically motivated manipulation will ensure proper administration of the election process throughout the entire election cycle, and especially from the pre-election period to the end of the processing of results”.<sup>24</sup> It is common to include both a subjective and an objective element in the independence requirement for institutions and public officials. This means that the composition, appointment, and procedures of EMBs should ensure the independence and perception of independence of the EMB for voters and candidates.

48. For this reason, many countries have resorted to the creation of electoral commissions as independent bodies responsible for the management and control of the electoral process. The composition of these bodies may include persons appointed by the political parties equally represented, provided that this equality may be interpreted either strictly or proportionally – in other words, taking or not taking into account the parties’ relative electoral strengths based on previous elections or current representation in elected bodies.<sup>25</sup> The Code of Good Practice in Electoral Matters suggests, as a general rule, that the permanent central electoral commissions include at least one member of the judiciary and representatives of parties already in parliament or having scored at least a given percentage of the vote.<sup>26</sup>

49. The composition of electoral commissions and polling boards in Serbia, both in their permanent and extended compositions during election periods, is the result of political appointment (Articles 17-40 LEMP).

50. The REC, in its standing composition, comprises 17 members and an equal number of deputy members (Article 17 of LEMP). All members and deputy members are appointed by the National Assembly. The term of office of the members and deputy members of the REC coincides with that of the National Assembly and ends with the convocation of a new National Assembly after a general election.

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<sup>22</sup> See *Georgian Labour Party v Georgia*, no. 9103/04, 08.07.2008, para. 101. See also *Podkolzina v Latvia*, no. 46726/99, 09.04.2002, para. 35; *Riza and Others v Bulgaria*, nos. 48555/10 and 48377/10, 13.10.2015, para. 143.

<sup>23</sup> See CDL-AD(2002)023rev2-cor, Code of Good Practice in Electoral Matters, guideline II.3.1.a and b.

<sup>24</sup> Venice Commission, CDL-AD (2002) 23 rev-cor, Code of Good Practice in Electoral Matters, para. 68.

<sup>25</sup> Venice Commission, CDL-AD(2002)023rev2-cor, Code of Good Practice in Electoral Matters, para. 75.

<sup>26</sup> See CDL-AD(2002)023rev2-cor, Code of Good Practice in Electoral Matters, guideline II.3.1.d and para. 75-76.

51. In a number of states, several shortcomings in the functioning of election commissions were detected whenever their composition was highly politicised. The Parliamentary Assembly of the Council of Europe has declared that “[m]ulti-party electoral commissions (...) do not seem to be the best solution. When they are opted for, there should be guarantees for their composition to be politically balanced and their functioning transparent throughout the electoral process”.<sup>27</sup> This recommendation for guarantees of political balance and transparency remains applicable to the Republic of Serbia.

52. In addition, the high number of members in the REC may cause certain difficulties in its work, as decision-making is prolonged due to longer discussions among a high number of REC members, which may lead to the inability to reach consensus, lack of collegiality, or ineffective sessions in case all members are rightfully given the floor to express their views. EMBs have to make all decisions during elections promptly and decisively. According to Article 18, the members and deputy members of the REC are appointed at the proposal of parliamentary groups proportionately to their representation in the National Assembly. As a safeguard, no parliamentary group may nominate more than half the members of the REC. If a parliamentary group has more than half of the total number of MPs, this group shall nominate the president and seven members of the REC in its standing commission, and the same for deputy members. A party holding a majority in parliament cannot appoint a majority of the members of the REC (8 out of 17), which is positive for the appearance of independence. However, the REC will still largely reflect the proportional representation of the party groups in parliament. Importantly, using party groups (factions) as a criterion may not be an accurate reflection of the distinction between the government majority and the opposition. The important safeguard in Article 17 against the appointment of a majority of members by one party group does not account for cooperation and alliances between party groups, for example, by forming a coalition government. Therefore, the current safeguard does not prevent a formal or informal coalition of parties from nominating a majority of members of the REC. Furthermore, a model which relies solely on political representation in EMBs risks politicisation even when representation is balanced between the government coalition and the opposition.<sup>28</sup>

53. It has been pointed out by election observation missions that the composition of the election administration bodies in Serbia could lead to excessive politicisation to the detriment of their neutrality, thus putting into question its independence and impartiality.<sup>29</sup> The trust in the work of election administration among political party and NGO representatives remained uneven due to the perceived domination of the ruling party.<sup>30</sup> In the opinions on the Law regulating referenda, the Venice Commission recently recommended that the composition of the REC be reformed to include independent experts.<sup>31</sup> It recommended “considering a broader and long-term reform of the composition of the electoral administration to be applicable after the next constitutional referendum and elections.”<sup>32</sup> In their 2009 joint opinion, the Venice Commission and ODIHR had considered a draft proposal by the election authorities in Serbia to establish a State Election Commission as an autonomous and independent body, with nine permanent members proposed by experts of different institutions and by NGOs and appointed for seven years by the National Assembly.<sup>33</sup> The Venice Commission and ODIHR welcomed these proposals as positive improvements for the independence and professionalism of electoral administration in Serbia, but they were subsequently not adopted by the Parliament.

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<sup>27</sup> PACE, Resolution 1897 (2012) Ensuring greater democracy in elections, para. 8.2.1.

<sup>28</sup> See Venice Commission, [CDL-AD\(2020\)023](#), Report on Electoral Law and Electoral Administration in Europe, paras. 27-28.

<sup>29</sup> PACE Election observation report of the presidential election in Serbia (2 April 2017), para. 19.

<sup>30</sup> 2022 ODIHR [Final Report](#), presidential and early parliamentary elections, page 8.

<sup>31</sup> [CDL-AD\(2021\)033](#), para. 38, 40 and 42; [CDL-AD\(2021\)052](#), para 23.

<sup>32</sup> See [CDL-AD\(2021\)052](#), para 23.

<sup>33</sup> See [CDL-AD\(2009\)039](#), para. 23-24.

54. The REC is a key institution for the lawful conduct of elections, and several of its powers listed in Article 24 are of a legal nature, for example deciding on election complaints. The REC does not have its own permanent separate secretariat but relies on technical assistance from the staff and services of the National Assembly. While the REC may have legal expertise from individual members to a certain extent, the capacity of its secretariat and the current political appointment model do not provide the REC with professional authority.

55. Different measures could be taken to strengthen the independence of the REC. One possible solution is de-politicising both the appointment process and the composition of the REC by including members from non-political institutions that are perceived as being neutral. This may also have the additional advantage of improving the professionalism of the REC, which is not guaranteed by the present model, for example, if one or more members are judges (as suggested by the Code of Good Practice in Electoral Matters). According to Article 16, members of the REC must have a higher education law degree, but this alone hardly guarantees expertise and professional skills in electoral administration. Another solution is to detach the appointment of the REC from the parliamentary terms and/or stagger appointments so that not all members are appointed in the same parliamentary term (in case the changes are introduced to the fully political compositions appointed by the parliament). It is also possible to prevent politicisation by requiring a qualified majority to adopt certain decisions,<sup>34</sup> which in the current laws are made by the majority of all appointed members (see Article 12).

56. The Venice Commission and ODIHR, therefore, recommend, in the framework of a reconsideration of the composition of the REC, strengthening the professional background and expertise of its members, the balance between the parties supporting the government and the opposition, and the possible inclusion of independent members who are not directly appointed by the parties or who require a broad consensus for their nomination.

57. There are two levels of EMBs under the REC: local electoral commissions and polling boards. LECs, newly introduced as mid-level commissions for the conduct of parliamentary and presidential elections, are also regulated in the Law on Local Elections. The rules for appointment and composition appear to roughly mirror those of the REC,<sup>35</sup> including the prohibition for one councillor's group to nominate more than half the members and deputy members of the electoral commission in its standing composition (Article 20 of the LLE). The Venice Commission and ODIHR recommend if changes are made to the appointment and composition of the REC, that similar changes may be considered for the LECs.

58. A specific feature of EMBs in Serbia is that they operate in a "standing" (or "permanent") composition outside of the election process and an "extended" composition for the election period. For the election, the composition of the commissions is extended to include members nominated by the political parties that have registered candidate lists to participate in the elections (see Article 10 of the Law on the Election of Members of Parliament and Article 12 of the Law on Local Elections). The idea behind the extended compositions is to provide the possibility for oversight of the election process by the political subjects contesting the elections but also provide a level of shared responsibility in managing the process.

59. The size of the EMBs, during the campaign period, depends partly on the number of electoral contestants, which may be considerable. The rules of appointment of EMB members in the extended composition are also quite complicated, and the existence of two different types of compositions of EMBs complicates their regulation (e.g., possible confusion in terms of quorum) and work (the process of reaching consensus, collegiality). Moreover, the use of extended

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<sup>34</sup> See CDL-AD(2002)023rev2-cor, Code of Good Practice in Electoral Matters, Explanatory Report, para. 80.

<sup>35</sup> See CDL-AD(2002)023rev2-cor, Code of Good Practice in Electoral Matters, Explanatory Report, para. 82.

composition introduces an additional cost and may pose challenges to the transparency of the election day process (for example, in case of overcrowding at the polling premises of LECs). The Venice Commission and ODIHR recommend, in a reform of the electoral legislation, reviewing the justification and methods of functioning of the extended composition. At a minimum, it could be considered that the political parties that are already present in the standing compositions (the parliamentary parties) need not also be present in the extended formations. It should be noted, however, that the extended compositions are the only vehicle for the electoral contestants to observe and oversee the election process because the election legislation in Serbia does not include the possibility of party proxies or party observers. Therefore, any modifications to the system of extended EMB compositions must bear in mind one of the primary ideas behind their existence in the first place, i.e., the possibility of observing and overseeing the election process unimpeded.

60. By law (article 22 of LEMP), following the candidate registration process, the standing composition of the REC receives the nominations for its own extended composition, which may not ensure sufficiently impartial decision-making. Under article 23, the REC's decision on appointment or rejection to appoint the REC member in the extended composition is submitted to the REC. Hence, the decision-makers review their own decision, which does not allow impartial and effective legal remedy. This mechanism should be reconsidered to provide for an impartial and independent review of decisions made by the REC.

61. The LEMP contains certain general rules common to all EMBs. Among these, we find two important rules to shield members of EMBs from political manipulation. Article 13 prohibits the appointment of MPs or MP candidates to such positions. Articles 14 and 15 regulate the termination of the office of members of an EMB. The listed grounds for dismissal do not appear to allow for the discretion of the National Assembly as the appointing body, which is an important starting condition for the safety of tenure.

62. The general requirement of gender balance in the EMBs (Article 11.1 of the LEMP) is generally worded and thus declaratory, which does not provide sufficient clarity on how to implement the norm. The Venice Commission and ODIHR recommend making it more precise by prescribing a clear set of measures, thus ensuring that the norm is applied effectively. In addition, the law could further oblige the REC to report on the implementation of the norm by accumulating and posting the gender breakdown information on its website, both for the standing and for the extended commissions.

63. According to Article 38.2 of the LEMP, a member or deputy member of the standing composition within the PB organised in penal institutions shall be appointed by the REC at the proposal of the Ministry of Justice. This may hamper the independence of the polling board, as the minister could propose members loyal to the political party the minister is from. The Venice Commission and ODIHR recommend that, while the Ministry of Justice would be consulted before the nomination of the polling board members, those nominations should not deviate from the mechanism for other appointments of other PBs.

64. Article 14.6 of the LEMP allows for a possibility for members of EMBs to continue their work even after imprisonment for crimes if the term of imprisonment is less than six months. As the prerequisite for participating in the work of the central election authorities is a high level of ethics, this may have a strong negative impact on the trust in EMBs. The Venice Commission and ODIHR recommend extending the exclusion from the REC and LECs regardless of the length of imprisonment if such imprisonment coincides with the term of office of the EMB member.



## 2. Functioning of Electoral Commissions and Polling Boards

65. The 2022 election observation mission reports stated that some REC members noted that not all background material necessary for meaningful discussions was shared in time before sessions. Some REC members nominated by the opposition parties asserted that there was a lack of internal communication within the commission. Some LECs claimed to have received information from the REC on certain issues late, including on the training of polling board members.<sup>36</sup>

66. The Venice Commission and ODIHR have already pointed out in their previous recommendations about the Serbian electoral legislation that “all members of electoral commissions should be guaranteed the opportunity to participate in full in the administration of the election. Such guarantees are particularly important for members appointed in the extended composition of the REC and PBs. In order to provide such guarantees, all members should be notified in a timely manner of sessions, provided with full access to election documentation, and invited to attend and participate on an equal basis in all sessions.” While these guarantees are provided by the REC Rules of Procedures, it could be considered that the principles of timely access to sessions and materials for all REC members are also provided in the law.<sup>37</sup> In this respect, the Venice Commission and ODIHR recommend including in the law precise guarantees of the rights of the members of electoral commissions.

67. The Law prescribes a responsibility of the REC to develop training programs and conduct training for members and deputy members of lower-level EMBs. It also recommends that when proposing a candidate for PB president and deputy president, a preference should be given to a person who has attended training and has experience in conducting elections.

68. The Final Report of ODIHR’s Election Observation Mission for the 2022 elections reported on some election stakeholders’ concerns about the excessive use of authority by the REC chairperson, namely in decision-making and their normative work.<sup>38</sup> An analysis of the reasons necessitating (or leading to) unilateral decision-making by the REC chairperson could be conducted to assess whether any modifications need to be made in the REC decision-making process.

69. The law should be supplemented with dissuasive sanctions for misconduct, failure to act and the misuse of authority by the EMB members, along with the principles of attribution of responsibility for misconduct or deficient performance by the EMB as an entity. The responsible oversight body should be determined without undermining the independence of the EMBs. Timely and effective implementation of the norms should be ensured.

70. Reports of international election observation missions raised concerns about the technical capacity of the LECs with regard to their new responsibilities, such as the post-electoral audit of election materials and training of the PBs.<sup>39</sup> Observers noted a lack of a uniform approach by LECs in dealing with discrepancies and correction of protocols.<sup>40</sup> It is notable that participation in training sessions is not mandatory for PB members. The quality of training sessions varied, with some trainers not providing sufficient opportunity for questions and comprehensive

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<sup>36</sup> 2022 ODIHR Final Report, presidential and early parliamentary elections, page 9 and PACE, Election observation report of the early parliamentary and presidential elections in Serbia (3 April 2022), para. 16.

<sup>37</sup> Venice Commission and ODIHR, [CDL-AD\(2006\)013](#), Joint Recommendations on the Laws on Parliamentary, Presidential and Local Elections, and Electoral Administration in the Republic of Serbia, para. 21.

<sup>38</sup> 2022 ODIHR Final Report, presidential and early parliamentary elections.

<sup>39</sup> PACE, Election observation report of the early parliamentary and presidential elections in Serbia (3 April 2022), para. 16

<sup>40</sup> 2022 ODIHR Final Report, presidential and early parliamentary elections.

clarifications.<sup>41</sup> Insufficient understanding of the procedures by polling boards appears to have resulted in inconsistent implementation of important safeguards related to the integrity of the process and secrecy of the vote. In some cases, in their effort to speed up the vote count, polling boards omitted important procedural steps put in place to safeguard the integrity of the vote count process.<sup>42</sup>

71. The Venice Commission and ODIHR recommend that training of the LEC and PB members be reinforced, particularly during electoral periods, in order to allow the PB members, and particularly those of extended composition, to adequately fulfil their duties. All members of polling boards, including the extended ones, should receive timely, efficient, and uniform training on election-day procedures, and it could be considered that training or refresher courses are mandatory for all appointed PB members. Practical exercises, particularly related to the secrecy of the vote, order of the counting procedures and completion of the results protocols, could be considered.

### **C. Electoral campaign**

#### **1. Access to the media**

72. Equality of opportunities regarding access to the media during electoral campaigns has been recognised as one of the most important principles in guaranteeing free and fair elections.<sup>43</sup> The lack of equal opportunities for electoral competitors with regard to their possibilities of access to the media is a matter of great concern in the Republic of Serbia. This is a problem that has different causes, some of which have to do with the structure of media ownership and with the media's dependence on public funding and private advertising, and others more directly related to the rules governing election campaign coverage.

73. The first type of issue is outside the scope of electoral legislation. However, consideration should be given by the authorities to adopting legislation to ensure transparency of media ownership, and to provide for objective criteria regarding the distribution of public resources to the private media, not only through subsidies but also through institutional advertising. Measures need to be introduced to permit uninhibited access of media to the advertising market and full freedom to generate income through commercial advertising contracts with private entities.

74. The second type of issue is directly related to the media coverage of the campaign. In this respect, there are two main problems that have been highlighted in the recent election observation mission reports: media coverage of the incumbent President and other public officials who are also candidates;<sup>44</sup> and problems related to supervision and control of compliance with the legislation.<sup>45</sup>

- a. Media coverage of the incumbent President and other public officials who are also candidates

75. As the 2020 report of the Venice Commission on electoral law and electoral administration in Europe points out, “[d]emocratic elections depend largely on the ability and the willingness of the

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<sup>41</sup> PACE, Election observation report of the early parliamentary and presidential elections in Serbia (3 April 2022), para. 18

<sup>42</sup> PACE, Election observation report of the early parliamentary and presidential elections in Serbia (3 April 2022), para. 50.

<sup>43</sup> Venice Commission, Code of Good Practice in Electoral Matters, CDL-AD (2002) 23 rev., para. 18ff.

<sup>44</sup> PACE, Election observation report of the early parliamentary and presidential elections in Serbia (3 April 2022), paras 40, 41.

<sup>45</sup> PACE, Election observation report of the early parliamentary and presidential elections in Serbia (3 April 2022), para. 43.

media to work in an impartial and professional manner during electoral campaigns. The failure of the media to provide impartial information about electoral campaigns and contestants is still one of the most frequent shortcomings arising during elections. In a number of Council of Europe member states, contrary to the law and other regulations, the media provide neither quantitatively nor qualitatively for balanced coverage of parties and candidates".<sup>46</sup>

76. In the Republic of Serbia, the law obliges all public broadcasters to provide information about the contestants in a non-discriminatory and objective manner. Public service media must ensure equal reporting about all contestants and provide them with equal airtime to present their platforms. As reported by the Parliamentary Assembly and the ODIHR election observation mission, public broadcasters covered the campaign activities of all election contestants in line with the law and granted them access to special election programmes.<sup>47</sup>

77. However, it has been pointed out that incumbents' and ruling parties' activities usually enjoy extensive, uncritical and, at times, promotional coverage in public and government-affiliated private media. Influential private media with national coverage focused their news coverage on State officials, many of them standing as candidates, often promoting governmental projects in the campaign period.<sup>48</sup> Moreover, the election campaign period is very short and starts with the registration of candidates and candidate lists, as the candidates' lists are registered three weeks before the elections. The brevity of the campaign period is due to a relatively short period between calling the elections and election day (e.g., by law, at least 30 days before presidential and at least 45 days before parliamentary elections, which was the case for both presidential and parliamentary elections in April 2022). This may give unfair advantages to the political parties in the government, as their presence as ministers or other incumbents in the media may lead to unbalanced disguised campaigning.

78. It is of little use for the law to require non-discriminatory coverage for the electoral activities of all competitors if, at the same time, the government's advantage is disproportionate in respect of information which is not directly related to the elections. In reality, to a large extent, this is not a problem of legislation but of implementation. The uncritical and sometimes extensive news coverage of public officials who are also candidates is not fully in line with the regulatory framework that prohibits public media from granting such officials a privileged status.<sup>49</sup> However, there does not seem to be an adequate reaction from the supervisory bodies to prevent or stop such infringements.

79. In order to avoid biased treatment of information not directly related to elections, the Venice Commission and ODIHR recommend strengthening the mandates of the supervisory bodies to enable enforcement of the campaign rules, prevent the violations of coverage, as well as giving supervisory bodies the ability to develop codes of good practice for the media during election periods. In these codes, without prejudice to the freedom of information that the media should enjoy, an obligation should be established to offer information in a balanced way, compensating the presence of members of the government derived from their official activity, with greater visibility of various political views, which notably includes the opposition representatives.

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<sup>46</sup> Venice Commission, Report on Electoral Law and Electoral Administration in Europe: Synthesis study on recurrent challenges and problematic issues ([CDL-AD\(2020\)023](#)), para. 172.

<sup>47</sup> PACE, Election observation report of the early parliamentary and presidential elections in Serbia (3 April 2022), para. 40.

<sup>48</sup> PACE, Election observation report of the early parliamentary and presidential elections in Serbia (3 April 2022), para. 41.

<sup>49</sup> PACE, Election observation report of the early parliamentary and presidential elections in Serbia (3 April 2022), para. 40.

## 2. Media oversight mechanisms

80. As noted in election observation reports, the existence of three competent bodies in this area can lead to the overlapping of mandates and dysfunctionalities.

81. Firstly, the Regulatory Authority for Electronic Media (REM) is vested with oversight of the broadcast media and adjudication of media-related complaints. However, according to April 2022 election observation mission reports, this body remained overall passive in regulating media conduct during the campaign and failed to tackle the critical issue of the coverage of the state officials.<sup>50</sup>

82. Secondly, reflecting concerns regarding the impartiality of the REM, in October 2021, a Temporary Supervisory Authority for Media Monitoring during the Election Campaign (TSA) was set up by the government to monitor the media's compliance with campaign regulations only for the April 2022 elections cycle. Of the 12 TSA members, six were proposed by REM and six by various opposition parties. Regrettably, the functioning of this body was hampered by internal disputes, and its effectiveness has been called into question by the lack of enforcement powers.<sup>51</sup> This institution is largely perceived as a failed experiment that did not contribute to effective media monitoring.

83. Thirdly, in addition to these two bodies, within the Parliament, there is also the Election Campaign Oversight Board (ECOB), composed of members nominated by parliamentary groups. This body can issue warnings and initiate proceedings through the REM. The legal framework regulating its formation and its mandate is vague and needs revision to ensure clarity as to the deadline of its creation, the division of tasks with other entities, and the scope and mechanisms for the realisation of the mandates. While during the April 2022 elections, the ECOB considered some notifications from NGOs and findings by the REM media monitoring, it did not initiate any proceedings with the relevant authorities to address any potential violations.

84. The multiplication of bodies, not always endowed with the necessary means to ensure the implementation of the law, did not lead to more effectiveness in oversight. Another problem impacting the timely remedy is the protracted sanctioning procedure by the REM. The minimum period to adjudicate a complaint is 21 days due to the compulsory legal procedures to be observed by the REM Council.

85. In terms of mechanisms for media oversight and control during campaigns, there are several areas of concern where there is room for improvement: the independence of the REM should be strengthened, and its responsibilities during the campaign period should be explicitly defined by law and extended to all aspects of media coverage of elections. The REM should be better positioned to act upon its own initiative, including through timely actions based on systematic monitoring of election coverage and compliance with established regulations. This leads to the following recommendations:

- (1) The scope of action and competences of the different monitoring and supervisory bodies need to be clarified by the regulatory texts, especially in relation to the ECOB
- (2) Legislative texts should offer clear and objective criteria for decisions on selection of the media outlets to be monitored. While the REM should include all relevant media outlets in the monitoring sample, including all media with national coverage, one of the main criteria should be the size of the audience of the channels.

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<sup>50</sup> PACE, Election observation report of the early parliamentary and presidential elections in Serbia (3 April 2022), para. 43.

<sup>51</sup> PACE, Election observation report of the early parliamentary and presidential elections in Serbia (3 April 2022), para. 43.

(3) The monitoring methodology should be clearly determined in a transparent process by the REM following consultations with the stakeholders. Monitoring should be based on quantitative and qualitative parameters. It would be beneficial if the monitoring also includes coverage of women candidates and women political participation.<sup>52</sup>

(4) Regarding its scope, monitoring should not only focus on election broadcasts (campaign information, interviews and debates) but also extend to information on state officials.

(5) Ex-post supervision and sanction measures should be combined with preventive and self-regulatory measures based on the drafting of codes of conduct.

(6) Sanctioning procedures during the election period need to be much more streamlined without prejudice to the guarantees for persons and organisations that may be affected.

### 3. Disinformation

86. Electoral campaigns have been profoundly transformed in recent years in line with advances in the digital society, and there is a widespread awareness that their regulation is becoming obsolete to cope with new situations, such as the massive dissemination of false information ( Disinformation) and the use of “big data” analysis for electoral purposes that put at risk the right of voters to access relevant information and make an informed choice. When disinformation targets the conduct of the elections and the integrity of democratic institutions, it may also have an impact on the trust and, ultimately, the integrity of the election process.

87. Serbia is one of the countries exposed to this challenge. In recent elections, credible allegations were made about the operation of organised groups on social networks, active in promoting ruling party policies and discrediting the opposition, including through spreading disinformation.<sup>53</sup>

88. In the Republic of Serbia, there is no specific legislation on electoral campaigning on social media or the internet. General limits to freedom of expression are set in Article 146.2 of the LEMP: “Should any participant in the election campaign by his/her conduct call for violence, spread national, religious or racial hatred or incite gender inequality, the oversight board shall without delay initiate proceedings before the competent state authorities”.

89. Regulation of disinformation needs to be tackled, but legislators must be extremely careful to avoid simplistic responses that could lead to a rollback of freedoms that are essential in a democratic society. The 2019 Venice Commission's Report on Digital Technology and Elections warns that “undue state intervention can result in undermining the very rights that it is meant to protect”.<sup>54</sup> This concern was also reflected in the 2017 Joint Statement by representatives of international mechanisms for the promotion of freedom of expression, which noted that “general prohibitions on the dissemination of information based on vague and ambiguous ideas, including ‘false news’ or ‘non-objective information’, are incompatible with international standards for restrictions on freedom of expression”.<sup>55</sup>

90. In its Resolution 2254 (2019) on media freedom as a condition for democratic elections, PACE called on member states to implement effective strategies to protect the electoral process from disinformation and undue propaganda through social media, proposing, among other

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<sup>52</sup> See ODIHR, [Compendium of Good Practices for Advancing Women's Political Participation in the OSCE Region](#) (2016), pp. 59 and 65-66.

<sup>53</sup> PACE, Election observation report of the early parliamentary and presidential elections in Serbia (3 April 2022), para. 33.

<sup>54</sup> Venice Commission, [CDL-AD\(2019\)016](#), Report on digital technologies and elections, p. 35.

<sup>55</sup> UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur on Freedom of Expression, ACHPR Special Rapporteur on Freedom of Expression and Access to Information: Joint declaration on freedom of expression and “fake news”, disinformation and propaganda (2017), § 2.a.

measures, “specific regulatory frameworks for Internet content at election times and include in these frameworks provisions on transparency in relation to sponsored content published on social media, so that the public can be aware of the source that funds electoral advertising or any other information or opinion”<sup>56,57</sup> In recent years, Council of Europe member states, as well as the EU, have taken different regulatory approaches to balance freedom of expression with effective prevention of disinformation in general and electoral processes in particular, ranging from criminalisation to placing enforcement duties on social media platforms.<sup>58</sup> Particular care must be taken when defining disinformation so that the scope of the regulation does not disproportionately interfere with freedom of expression.

91. With regard to the regulation of online communications strictly focused on electoral periods, the Venice Commission and ODIHR recommend ensuring the transparency of all election-related online communications (i.e., identifying the source of the online messaging or ads, controlling against false attribution and fake imagery) and, at the same time, ensuring that the cost of these activities is taken into account for the purpose of enforcing political finance regulations. In order to prevent and control parallel and non-transparent campaigns (dark ads and dark posts), this regulation should take into account the paid communication activities carried out by third parties.

#### **4. Campaign financing**

92. Campaign financing is primarily regulated by the Law on Financing Political Activities (LFPA) and the 2019 Law on Prevention of Corruption (last amended in 2022), supplemented by regulations of the Agency for Prevention of Corruption (APC). The Law on Financing Political Activities adopted in February 2022 addresses several previous repeated recommendations, such as lowering donation limits, introducing interim reporting on donations and expenditures and establishing ceilings on political party membership fees and loans. However, some previous Venice Commission and ODIHR recommendations remain unaddressed, including those pertaining to the improvement of the oversight mechanism and the introduction of a campaign expenditure limit. The Venice Commission and ODIHR reiterate these recommendations. The remaining shortcomings and limited enforcement diminish the transparency and effectiveness of the campaign finance framework, as underlined by election observers at the occasion of the 2022 elections. Many interlocutors reported mistrust in the effectiveness of the regulatory system as currently implemented.<sup>59</sup>

##### **a. Private funding of electoral competitors**

93. Article 10 LFPA limits the maximum value of donations from private sources (natural and legal persons) to 10 and 30 average monthly salaries, respectively; these amounts are doubled in election years, regardless of the number of contests. Private funding allowed by law includes membership fees, donations from natural and legal persons, credits and loans, inheritance, legacy, and income from entities' own property. Although the amount allowed for legal persons has been considerably reduced in the last reform, from 200 to 30 net monthly salaries, it is still quite high, especially in election years when the limit is doubled. The Venice Commission and ODIHR recommend lowering the ceiling for donations from legal persons in line with the limits set in most Council of Europe member states.

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<sup>56</sup> PACE, Resolution 2254 (2019)1, Media freedom as a condition for democratic elections, para. 9.2.

<sup>57</sup> On transparency of campaign support, financing and electoral spending see Recommendation [CM/Rec\(2022\)12](#) of the Committee of Ministers to member States on electoral communication and media coverage of election campaigns, Appendix, 3.

<sup>58</sup> See Ó Fathaigh, R. & Helberger, N. & Appelman, N. (2021). The perils of legally defining disinformation. *Internet Policy Review*, 10(4). <https://doi.org/10.14763/2021.4.1584>.

<sup>59</sup> PACE, Election observation report of the early parliamentary and presidential elections in Serbia (3 April 2022), para. 34.

Article 9 of the LFPA defines private donations as “a pecuniary amount, other than membership dues that a natural or legal person voluntarily gives to a political entity, a gift, as well as services provided without compensation or under conditions deviating from market conditions”. Article 7 of the LFPA, determines that private sources that political parties may use for the financing of their political activities comprise “membership dues, donations, inheritance, legacy and income from property”, while property could be acquired by political parties (Article 11 of the LFPA) through purchase, inheritance and legacy. ODIHR and the Venice Commission, therefore, recommend aligning the provisions of Article 9 of the LFPA to the provisions of Articles 7 and 11 to directly regulate the donation of immovable property to avoid formalistic interpretations limiting the disclosure of acquisition of property from private entities and individuals and to ensure compliance with transparency and accountability requirements, in line with international good practice.<sup>60</sup>

94. It is also recommended to reconsider the concept of in-kind donations under Article 9 of the LFPA to ensure a clear distinction between donations of services and the expression of political activities of individuals rather than political contributions. In line with international good practice, such a distinction shall be drawn on the basis of evaluating whether the actions would be qualified as services under the normal conduct of business.<sup>61</sup> If the contributor would regularly be entitled to compensation for identical services performed for other clients, or the beneficiaries would be obliged to give compensation for such services, the contributions shall be considered in-kind donations, to be accounted for under their market value and reflected in the campaign finance reports. If no such compensation would be due to the service provider in the normal conduct of their business, the provision of services should be considered as individual political activity.

#### b. Expenditure limits

95. There is no cap on campaign spending from private sources (Article 22), unlike public sources (Article 21). Article 23 prohibits certain types of campaign expenditure but does not introduce a limit.

96. The 2022 election observation report mentioned significant financial disparities among candidates and parties as one of several causes for an uneven playing field, favouring the incumbents. Gross disparities in campaign financing may raise problems in relation to equality of opportunity. Expenditure limits, when properly applied, are one of the most effective means of ensuring a level playing field. The United Nations Human Rights Committee notes in General Comment No. 25 that “reasonable limitations on campaign expenditure may be justified where this is necessary to ensure that the free choice of voters is not undermined, or the democratic process distorted by the disproportionate expenditure on behalf of any candidate or party”. In the same perspective, the Code of Good Practice in Electoral Matters suggests that, in certain cases, there should be limitations on political party spending, especially on advertising.<sup>62</sup> The Venice Commission and ODIHR have also noted in their Joint Guidelines on Political Party Regulation that “[i]t is reasonable for a state to determine the criteria for electoral spending and a maximum spending limit for participants in elections, in order to achieve the legitimate aim of securing equity among candidates and political parties”, also pointing out that “[t]he legitimate aim of such restrictions must, however, be balanced with the equally legitimate need to protect other rights,

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<sup>60</sup> See Venice Commission and ODIHR, CDL-AD(2020)032, Joint Guidelines on Political Party Regulation, 2nd edition, para. 216, 260.

<sup>61</sup> See Venice Commission and ODIHR, CDL-AD(2020)032, Guidelines on Political Party Regulation, 2nd edition, para. 217”.

<sup>62</sup> See CDL-AD(2002)023rev2-cor, Code of Good Practice in Electoral Matters, guideline II.3.3.d; CDL-AD(2020)025, Report on Election Dispute Resolution, Guideline A.2.3.e.

such as those of free association and expression. This requires that spending limits be carefully constructed so that they are not overly burdensome<sup>63</sup>.

97. The failure to provide for expenditure limits in the Republic of Serbia's electoral legislation, while not contrary to international standards, is a shortcoming that jeopardises the objective of ensuring a level playing field. Therefore, to prevent increasingly high levels of election spending and to ensure equality of opportunity among electoral competitors, the Venice Commission and ODIHR once again recommend establishing by law reasonable limits to campaign expenditures.

c. Tax audits of donors

98. Article 36 LFPA foresees that “[t]he annual tax control plan, adopted in accordance with the law governing the tax procedure and tax administration, shall include the control of donors of funds, and/or goods and services to political entities”. This provision, which may be reasonable in principle, can have a detrimental effect on donations. Opposition parties have argued that the risk of being subject to tax scrutiny may have discouraged potential donors<sup>64</sup>. The control of donations is a key element of any legal framework on political finance, but it is necessary that the applicable rules are clear and establish objective criteria in order to avoid political bias. The main problem lies in the criteria used to select the donors to be audited. The law just states that they are “selected on the basis of the report of the Agency [for Prevention of Corruption]” (Article 30, paragraph 2 LFPA). Without clear legal criteria, the selection of donors is within the discretion of the APC. The Venice Commission and ODIHR recommend prescribing objective, reasonable and non-discriminatory criteria to determine the donors subject to the tax audit, ensuring that the decision to carry out a tax audit of donors is based on these criteria.<sup>65</sup>

d. Reporting and transparency mechanisms

99. The submission of interim income and expenditure reports during the electoral process is one of the reforms undertaken in February 2022 and has generally been welcomed because it complies with previous recommendations. Following these new rules, contestants must submit an interim campaign finance report to the APC 5 days prior to elections, which is published by the APC online three days after submission. However, this interim report only covers the period of time up to 15 days before the election, which means that it leaves out precisely the final phase of the campaign and the expenditure of public funds.

100. As underlined in the Venice Commission and ODIHR Joint Guidelines on Political Party Regulation, transparency in campaign finance “is important to protect the rights of voters, prevent corruption and keep the wider public informed” and “[v]oters must have relevant information as to the financial support given to political parties, as this influences decision-making and is a means of holding parties accountable”.<sup>66</sup> To ensure transparency, the information must reach the voters in a simple, comprehensible and timely manner (and be available for reasonable periods) in order to help them make their electoral choices. Today's technology allows reporting to be done in near real-time. The Venice Commission and ODIHR recommend considering extending the time period covered by the interim report up to a date closer to the election day.

The 2022 Final Report by ODIHR noted that in the absence of legal provisions regulating the scope of reports and detailed reporting guidelines, the campaign finance reporting lacked

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<sup>63</sup> Venice Commission and ODIHR, [CDL-AD\(2020\)032](#), Guidelines on Political Party Regulation, 2nd edition, para. 248.

<sup>64</sup> PACE, Election observation report of the early parliamentary and presidential elections in Serbia (3 April 2022), para. 36.

<sup>65</sup> See Venice Commission and ODIHR, [CDL-AD\(2020\)032](#), Guidelines on Political Party Regulation, 2nd edition, para. 278.

<sup>66</sup> *Ibid.* para. 247.



uniformity and comprehensive accountability. It is recommended to ensure that the regulation provides a sufficient explanation of the scope and level of details of campaign finance reports, including all types of in-kind contributions, third-party financing, unpaid (pending) contracts, and reporting on financing by the coalitions.

e. Oversight mechanisms

101. When considering the financing of political parties and activities, the implementation practices, the monitoring of compliance with the rules and the enforcement mechanisms are of equal importance to the legal requirements *per se*. Limited enforcement undermines the effectiveness of the campaign finance framework. In this respect, many interlocutors have reported mistrust in the effectiveness of the regulatory system as currently implemented.

102. The APC may initiate additional audits, issue warnings, and launch misdemeanour or criminal proceedings *ex officio* or upon complaints, leading to financial sanctions. However, the election observation reports have pointed out that the APC did not effectively respond to potential violations; and that most of its decisions on complaints were not duly substantiated, while some rejections were adopted in the form of conclusions rather than administrative decisions, which did not allow appeals, contrary to international standards and OSCE commitments.<sup>67</sup>

103. According to the 2022 ODIHR Final Report, some complaints on alleged misuse of administrative resources were not reviewed during the campaign. This can be partially attributed to conflicting regulations in the LFPA and the Law on Prevention of Corruption, with both acts containing regulations on the misuse of administrative resources. Article 50 of the Law on Prevention of Corruption prescribes the APC to decide on complaints alleging misuse of office or public resources within five days upon its receipt, while the LFPA establishes unclear deadlines for the APC to decide which depends on the notification of the contestants. Furthermore, while Article 78 of the Law on Prevention of Corruption entitles the APC to initiate proceedings *ex officio* and upon complaints, the LFPA requires a complaint to trigger the Agency's action on violations, including on the misuse of administrative resources in election campaigns. It is recommended to review Articles 78 and 92 of the Law on Prevention of Corruption to ensure clarity in the regulation on the APC's mandate to prevent formalistic interpretation of the law limiting the Agency's capacity to act *ex officio*.

104. The Venice Commission and ODIHR recommend that the law provides for clearer regulation of the APC's procedures. Among other issues, the law should provide for clearly defined and expedited deadlines to respond to alleged violations and the obligation to resolve them by means of legally substantiated resolutions.

105. A lack of transparency has been pointed out in the activity of observers deployed by the APC to monitor events and campaign materials. In the last election, the APC deployed 130 observers around the country to monitor campaign events and material. By law, the APC is required to verify the accuracy of the campaign reports against the documents provided by political parties and their contractors and publish conclusions within 120 days of the deadline for submitting the reports. The findings of campaign observers serve to crosscheck the accuracy of the campaign reports. The findings of these observers were not published. On 1 April 2022, the APC stated they initiated five cases of violation of campaign finance regulations based on the observer's findings but did not publish any additional information about them. The Venice Commission and ODIHR recommend requiring the publication of the campaign observers' reports by the APC.

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<sup>67</sup> Paragraph 5.10 of the 1990 OSCE Copenhagen Document states that "everyone will have an effective means of redress against administrative decisions, so as to guarantee respect for fundamental rights and ensure legal integrity".

f. Public funding

106. Public funding is an important mechanism for ensuring a level playing field in the campaign and for avoiding the overreliance on wealthy individuals and special interests. In the Republic of Serbia, political parties are entitled to public funding for financing their regular activities and specific disbursements for financing election campaigns. Public funding for regular political activities is only prescribed to the political parties represented in the parliament and distributed proportionately to the election results. Public funds for regular political activities of parliamentary parties can be used to finance their election campaigns. Public funding for election campaigns is conditional to the deposit of electoral bonds equal to the amount of the funds due. Contestants lose the bond if they fail to refund unspent funds or to refund the public funds fully in case they do not achieve the one per cent threshold. The funds are distributed in two instalments: one during the campaign and one after the announcement of the final results. The first instalment is distributed among all registered contestants equally, while the second, larger part, is distributed depending on the number of parliamentary mandates won by the political party.

107. This system of public funds distribution led to large disparities among contestants during the election campaign, in particular, because the majority of opposition parties were not represented in the outgoing parliament and therefore had not been beneficiaries of public funds for regular work. The ODIHR interlocutors shared that the first instalment of public funding was only sufficient for the coverage of the most basic campaign requirements, while the 2022 ODIHR final report highlighted that the available state subsidy of election campaign could not address the fundamental disparity between parliamentary and extra-parliamentary contestants, in particular when compared to the parliamentary majority. This system of public funds distribution, as applied to the Serbian political landscape, does not fully address the requirements of international good practice.<sup>68</sup>

108. Many election observation mission (EOM) interlocutors denounced the late disbursement of public funds for the campaign, which undermined the possibility of effective campaigning and contributed to an uneven playing field.<sup>69</sup>

109. The Venice Commission and ODIHR recommend amending the law to provide for the distribution of public funds before the start of the campaign.

110. The post-election disbursement of public funding is not conditional to the determination of lawful financing of election campaigns. The law does not prescribe the verification of campaign finance reports prior to the payment, and the deadlines for the disbursement and the submission and verification of final campaign finance reports are not aligned.<sup>70</sup> Thus, the campaign funds distribution system fails to provide safeguards against circumvention of the transparency and accountability requirements, contrary to international good practice.<sup>71</sup>

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<sup>68</sup> See Venice Commission and ODIHR, CDL-AD(2020)032, Joint Guidelines on Political Party Regulation, 2nd edition, para. 241 states that “legislation should ensure that the formula for the allocation of public funding does not provide one political party with a monopoly position, or with a disproportionately high amount of funding.”, and in para 242 it states that “Limiting public funding to a high threshold of votes, and to political parties represented in parliament would hinder the free flow of ideas and opinions”.

<sup>69</sup> PACE, Election observation report of the early parliamentary and presidential elections in Serbia (3 April 2022), para. 35.

<sup>70</sup> The second instalment of state funding is allocated within five days after the announcement of election results, while the final report on campaign financing is submitted within 30 days after the announcement of results.

<sup>71</sup> Venice Commission and ODIHR, CDL-AD(2020)032, Guidelines on Political Party Regulation, 2nd edition, para. 279 states that “Irregularities in financial reporting [...] should result in the loss of all or part of such funds for the party.”

ODIHR and the Venice Commission recommend reconsidering the default distribution of state funding due after the elections to ensure that the availability of funds is subject to the lawful financing of election campaigns based on the verification of duly submitted campaign finance reports.

g. Third-party spending

111. The activity of third parties during election campaigns has to be regulated, especially if such activity involves expenditure. “Third parties” refer both to individuals and to organisations who are not legally tied to, or acting in coordination with, any candidate or political party but who nonetheless act with the aim of influencing the electoral result.<sup>72</sup> As stated by the Venice Commission and ODIHR: “Even though the involvement of third parties as an expression of political pluralism and citizen involvement is not generally a negative phenomenon, it can create loopholes in the area of political and campaign finance, which should be regulated by legislators. Weak party and campaign financing and transparency rules are the most problematic and constitute a particularly high-risk area for corruption when it comes to the involvement of third parties in the sphere of political activities, yet measures taken to regulate third-party involvement should be necessary and proportionate [...] In order to avoid the creation of loopholes through which unlimited funding can be channelled, and financial transactions can be veiled, laws should set proportionate and reasonable limits to the amount that third parties can spend on promoting candidates or parties, ideally by applying existing ceilings for donations to political parties to these actors, as well.”<sup>73</sup>

112. The increase in campaign activities through social media has also facilitated the emergence of parallel campaigns, often of a negative nature, carried out by third parties formally dissociated from the political parties.

113. The Venice Commission and ODIHR recommend regulating the campaign-related communication activities of third parties, especially if it entails expenditure or in-kind contributions, to ensure transparency and accountability and to prevent them from being used to circumvent the limits set out in electoral financing legislation, including the ban on donations through third parties, under Article 13 of the LFPA.

## **5. Misuse of administrative resources**

114. As stated by the Venice Commission’s report on election law and election administration in Europe, “[t]oday, one of the most important and recurrent challenges observed in Europe and beyond, is the misuse of administrative resources, also called public resources, during electoral processes.

115. The 2016 Venice Commission and ODIHR Joint Guidelines for Preventing and Responding to the Misuse of Administrative Resources during Electoral Processes outline essential principles for preventing and responding to such misuse and preventing public authorities from taking unfair advantage of their positions, including by holding official public events for electoral campaigning purposes. These Joint Guidelines highlight the importance of a stable, accessible and foreseeable legal framework, as well as its implementation and enforcement practices; ensuring wide political freedoms in election campaigns to all, including wide access to the media; impartiality and professionalism of civil servants in election campaigns, as well as their neutrality, primarily reflected in the prohibition of civil servants from campaigning in an official capacity as

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<sup>72</sup> See Venice Commission and ODIHR, [CDL-AD\(2020\)032](#), Guidelines on Political Party Regulation, 2nd edition, para. 218.

<sup>73</sup> Ibid. para. 219. See also Venice Commission, [CDL-AD\(2020\)023](#), Report on Electoral Law and Electoral Administration in Europe: Synthesis study on recurrent challenges and problematic issues, para. 144.

candidates or supporters and the prevention of conflicts of interests, impartial and balanced coverage of all election-related events in the media; as well as transparency and equality of opportunity in the realisation of the passive election right and in the equitable access to public resources.<sup>74</sup>

116. Election observation reports regarding the Republic of Serbia have pointed out extended practices of misuse of administrative resources, such as pressure on public sector employees to support the incumbent and the ruling coalition, excessive budgetary allocations and distribution of goods to different categories of voters prior to the elections, engagement of public officials in campaign activities, coercion on municipal and public company workers to vote and mobilise new voters for the ruling coalition, and discriminatory access to public facilities for campaign activities. The use of administrative resources gave the ruling coalition a significant advantage of incumbency, benefiting from extensive media coverage and echoed in the social networks.<sup>75</sup> International bodies have recommended to the Republic of Serbia carry out a more precise regulation to tackle the problem of misuse of administrative resources. The lack of effective implementation of the regulation in force, dissuasive sanctions, including disqualification and loss of office, and the failure of the relevant authorities to prevent and prosecute violations are of serious concern and may significantly undermine confidence in the democratic and free nature of electoral processes.

117. None of the laws governing parliamentary, presidential or local elections prohibits public officials from engaging in any kind of public activities, including campaigning. None of the laws governing any of the elections creates sufficient safeguards against misuse of office and public resources, with norms regulating the engagement of public officials in public activities, including campaigning. The revision of the current electoral legal framework should ensure an effective balance between the realisation of individual rights for participation in political and public life and the collective interests in the integrity of public resources, accountable and ethical electioneering, and equality of opportunity.<sup>76</sup>

118. Apart from a thorough legal framework, including effective prohibitions, remedies and sanctions, also non-legal mechanisms are recommended. They shall raise awareness and increase political efforts aimed at preventing the misuse of state positions and public resources during electoral processes”.<sup>77</sup> According to the Joint Guidelines on administrative resources, the practices found in Serbia concerning the use of public positions to get an unfair advantage, for example, by making major announcements during the electoral campaign, should be prohibited (the current rules prohibit such behaviour only in the last ten days before elections and only from such events being covered by the broadcast media).<sup>78</sup>

119. Institutional advertising is one of the most frequent forms of abuse of administrative resources. It can affect equality of opportunity among electoral competitors in two ways: directly,

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<sup>74</sup> See [CDL-AD\(2016\)004](#), 2016 Venice Commission and ODIHR Joint Guidelines for Preventing and Responding to the Administrative Resources during Electoral Processes, Guidelines II.A.

<sup>75</sup> PACE, Election observation report of the early parliamentary and presidential elections in Serbia (3 April 2022), para. 31.

<sup>76</sup> Paragraph 7.6 of the 1990 OSCE Copenhagen Document requires the Participating States to “...provide such political parties [...] with the necessary legal guarantees to enable them to compete with each other on a basis of equal treatment before the law and by the authorities”, while paragraph 7.7 requires them to “ensure that law and public policy work to permit political campaigning to be conducted in a fair and free atmosphere in which neither administrative action, [...] bars the parties and the candidates from freely presenting their views and qualifications, or prevents the voters from learning and discussing them [...]”.

<sup>77</sup> Venice Commission, Report on Electoral Law and Electoral Administration in Europe: Synthesis study on recurrent challenges and problematic issues ([CDL-AD\(2020\)023](#)), para. 152.

<sup>78</sup> See [CDL-AD\(2016\)004](#), Joint Guidelines for Preventing and Responding to the Misuse of Administrative Resources during Electoral Processes, Guidelines B.1.1 and 1.3.

when it includes messages highlighting the achievements of the incumbents or any other messages of an electioneering nature, or indirectly because revenues derived from institutional advertising contracts can be used to favour pro-government media or to punish anti-government media.

120. The ODIHR and PACE election observation reports found that a “large number of public infrastructure projects were announced, initiated or inaugurated during before and during the campaign by the incumbent president or government representatives who were also candidates. Candidates sometimes failed to distinguish their official functions from political party campaigns, thus attributing government achievements to the ruling coalition. The use of administrative resources gave the ruling coalition a significant advantage of incumbency, benefiting from extensive media coverage and echoes in the social networks.”<sup>79</sup> ‘Recent legislative changes introduced a ban on the media coverage of opening or inaugurating events of projects of public benefit by State officials, who are also candidates, in a period of 10 days prior to election day. The provision was respected on most media monitored, but this period is too short to be an effective safeguard of a level playing field’<sup>80</sup>.

121. The Venice Commission and ODIHR recommend providing in the law for a longer period of prohibition of institutional advertising campaigns and events, except in certain circumstances provided for in the law and considering a ban on media coverage of certain institutional events and all types of government advertising campaigns –with justified exceptions– not only for a short period of time but during the entire election period. Consideration should also be given to the provision of a legal regulation on institutional advertising, also in non-election periods, to ensure objectivity in the awarding of these public contracts.

122. More generally, given the credible reports on the misuse of administrative resources in Serbia, the Venice Commission and ODIHR recommend that a legislative framework be reviewed and improved to ensure a level playing field for candidates. This framework should follow the principles in the Joint Guidelines on administrative resources, respecting the rule of law, political freedoms, impartiality, neutrality, transparency, and equality of opportunity. Rules should also take a broad definition of the electoral process, covering a period much longer than the electoral campaign as strictly understood in national electoral law.<sup>81</sup> The law should establish dissuasive sanctions for the misuse of office and administrative resources. Thorough implementation and enforcement practices should be ensured.<sup>82</sup>

123. The Guidelines require that an “institution functionally independent from other authorities should be responsible for auditing political parties and candidates in their use of administrative resources during electoral processes.”<sup>83</sup> According to Article 145 of the Law on the Election of Members of Parliament, the (10) members of the Election Campaign Oversight Board are appointed by the National Assembly. Half of the appointments shall be proposed by the Government, while the remaining half are proposed by the National Assembly from among prominent public servants. No member can be a member of a political party. This means that the political parties in the opposition may only nominate a small part of the board, whereas there is no mechanism to avoid the government from nominating members with political bias. The Venice Commission and ODIHR recommend changing the system of nomination in order to either avoid

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<sup>79</sup> See International Election Observation Mission, Republic of Serbia, Presidential and Early Parliamentary Elections, 3 April 2022, p. 9-10.

<sup>80</sup> PACE, Election observation report of the early parliamentary and presidential elections in Serbia (3 April 2022), para. 40.

<sup>81</sup> Guidelines para. 13.

<sup>82</sup> See [CDL-AD\(2016\)004](#), guidelines II.A.1.1, and C2.

<sup>83</sup> See [CDL-AD\(2016\)004](#), Joint Guidelines for Preventing and Responding to the Misuse of Administrative Resources during Electoral Processes, Guideline B.2.1.

any political decision-making (e.g. nominations made by media organisations, universities etc.) or foresee a balanced composition with nominations made only by political parties.

124. By law, the APC is in charge of oversight of the compliance with the anti-corruption framework and the LFPA, which regulate the prohibition of misuse of administrative resources. The powers of the Election Campaign Oversight Board in Article 146 of the LEMP are framed quite broadly, and it may be that the misuse of administrative resources falls under “actions ... which obstruct the election campaign and endanger the equality of rights of all candidates”.

125. Article 146.1.4 of the LEMP also provides that the Election Campaign Oversight Board shall address the public with a view of protecting the moral integrity of the candidate’s personality. This provision is vague and potentially allows for the Board releasing critical statements about candidates, or interject in the public discourse on candidates’ personalities relevant in the campaign, thus influencing freedom of voters to form an opinion. The law should be amended to make it clear that the Board should not take part in the public debate but only sanction the illegal campaigning, (subject to the appeal to the judiciary) and/or alert other authorities (in case of a suspected need to open a criminal investigation)

126. The Venice Commission and ODIHR, therefore, recommend undertaking wide-scope measures to prevent misuse of office and state resources, including a detailed regulation of such practices, the provision for mechanisms such as thorough oversight for ensuring compliance and the provision for proportionate and dissuasive sanctions, in conformity with the Joint Guidelines of the Venice Commission and ODIHR.

## **D. The electoral system for the election of the Parliament**

### **1. In general**

127. The 250 members of the parliament are elected for a four-year term through a proportional system with closed candidate lists from a single nationwide constituency. Mandates are distributed among candidate lists that receive at least 3% of the votes cast. Lists representing national minorities are exempt from the threshold requirement.

128. The choice of the electoral system is the sovereign decision of the Republic of Serbia. Both proportional, majoritarian, and mixed systems, in different forms, can provide free elections that represent the will of the people. The electoral system in Serbia is a proportional system applied in a single nationwide constituency with closed lists. From a technical point of view, a proportional system with one single constituency has the potential to produce an accurate representation of the voters’ will. In practice in Serbia, the closed list system means that the representativeness of the National Assembly, in terms of a link between voters and their MPs, is highly dependent on the internal democracy in the political parties. A single constituency and closed electoral lists in Serbia have resulted in the political parties and, in particular, a small group of persons in the leadership of a few parties having significant influence over the composition of the National Assembly and the parliamentary race being focused on the party leaders.<sup>84</sup> . Therefore, the Venice Commission and ODIHR recommend considering measures to increase internal political party democracy and to ensure opportunities for participation that are not unduly limited by the party leadership. This could be achieved by reviewing existing requirements for internal democracy within political parties and assessing the impact of the electoral system on political participation and possible measures to mitigate this impact;

129. According to Article 73 of the LEMP, “[t]here must be at least 40% of members of the underrepresented sex on the electoral list, so that among every five candidates in the list

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<sup>84</sup> See Venice Commission, [CDL-AD\(2006\)025](#), Report on the Participation of Political Parties in Elections, para. 10.

according to their order (the first five places, the next five places, and so on until the end) there must be three members of one and two members of the other sex". The rapporteurs were informed that shortly after the 2022 election, several women MPs resigned and were replaced by men. To ensure that the gender balance is kept, the Venice Commission and ODIHR recommend considering the introduction of a provision according to which MPs who resigned after they were elected are replaced by next candidates of the same gender, in the case the resigning candidate is of the underrepresented gender, and the next candidate is of the overrepresented gender. This rule could also be applied in general to include cases of death or a loss of eligibility by standing candidates or elected MPs.

130. The law requires 10,000 signatures for all candidate lists to stand for the parliamentary election, even lists from parties that already have parliamentary representation. The purpose of signature requirements is to show there is a minimum level of support for candidates that wish to stand for election and to prevent a large number of candidates with little support from confusing the choice of the voters. As noted in Article 8 of the Explanatory Report to the Code of Good Practice, "[i]n practice, only the most marginal parties seem to have any difficulty gathering the requisite number of signatures". Parties that are represented in parliament have already demonstrated a minimum level of support, and an additional signature requirement appears unreasonable. The Venice Commission and ODIHR recommend that parties represented in parliament be exempted from the signature requirement.

131. The law does not explicitly provide for individual candidates in parliamentary elections. In order for a person to run independently they would still have to collect 10,000 support signatures and register a list of with only one candidate. This is an undue burden that runs counter to the aims of international standards and commitments on electoral participation either independently or as party of a political party.

132. One voter may support by signature the nomination of only one candidate, which runs contrary to international good practice as it limits the effect on political pluralism.<sup>85</sup> The Venice Commission and ODIHR recommend that voters should be free to support many candidates' lists or candidates as, in some cases, support signatures could restrict smaller opposition parties from getting enough signatures and voters publicly supporting these parties could be harassed.

## **2. Representation of national minorities**

133. The Republic of Serbia recognises 23 national minorities which have been constituted and which exercise rights through their respective National Minority Councils. Chapter VII of the Law on the Election of Members to Parliament contains rules that enable national minorities to register national minority electoral lists in parliamentary elections. Compared to other electoral lists, national minority candidate lists are granted more favourable terms for registration for parliamentary elections, as they need to collect only 5,000 signatures in support compared to 10,000 for other electoral lists (Article 138). National minority parties are easier to register, with only 1,000 support signatures required, compared to 10,000 signatures for other parties.<sup>86</sup> National minority lists also have an advantage in reaching parliamentary representation, as they are not subject to the 3% threshold applicable for other electoral lists, and the quotient of national minority lists having won less than 3% of the votes for the purpose of competing for seats, is

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<sup>85</sup> Paragraph 3 of the 1990 OSCE Copenhagen Documents states that the OSCE participating States "recognize the importance of pluralism with regard to political organizations." Paragraph 96 of the 2020 Joint Guidelines on political party regulation ([CDL-AD\(2020\)032](#)) states that "legislation should not limit a citizen or other individual to signing a supporting list for only one party".

<sup>86</sup> The 2009 Law on Political Parties contains provisions promoting participation of national minorities in public life. While 10,000 signatures are required to register a political party, a national minority can register a party with 1,000 signatures. Out of over 100 registered political parties, some 60 represent national minorities.

increased by 35% (Article 140). For the 2022 elections, 11 candidate lists applied for national minority status.

134. The exemption of national minorities from the threshold, based on Article 14 of the Constitution, is not in contradiction with international standards. Serbia has ratified the Council of Europe's Framework Convention for the Protection of National Minorities. Article 15 of that convention requires member states to allow for the "effective participation of persons belonging to national minorities in [...] public affairs". "Special rules guaranteeing national minorities reserved seats or providing for exceptions to the normal seat allocation criteria for parties representing national minorities (for instance, exemption from a quorum requirement) do not in principle run counter to equal suffrage."<sup>87</sup>

135. However, there are some shortcomings in the legal provisions concerning the granting of national minority list status.

136. Article 137 of the LEMP provides that the national minority list status shall be recognised by the REC if the main goal of its submission is to represent the interests of the national minority, as well as to protect and enhance the rights of national minority members, in compliance with the international legal standards; the submitter "may only be a political party of a national minority or a coalition composed exclusively of political parties of national minorities". The REC has a broad discretionary power to decide whether these conditions have been fulfilled. To this end, "[t]he REC may seek the opinion of the competent national minority council on whether a certain electoral list may hold the status of a national minority electoral list". It is understood that if the list has been submitted by a political party representing a national minority, it will represent that minority. Article 138 of the LEMP provides that the REC can deny national minority status to a submitted list "if the list leader or MP candidate on that electoral list is a person who is generally known to be a member of another political party which is not a national minority political party or if other circumstances are established which undoubtedly indicate the intention to circumvent the law".

137. The law does not foresee any requirement to prove that a given list actually belongs to a national minority, apart from the declaration of its submitters and the opinion of the competent national minority council that may be eventually requested by the REC. For instance, it is not clear whether there is an obligation for all members of the list to belong to the national minority they claim to represent or what percentage of members must belong to that minority. Most notably, it is not clear by what means the members of the list can prove – or if they may be obliged to prove – that they belong to the national minority.<sup>88</sup>

138. Regarding the grounds for refusal of status, the reference to the general knowledge or to "circumstances that undoubtedly indicate the intention to circumvent the law" are vague and therefore make it very difficult for the REC to conclude that a given list is attempting to abuse the status of a national minority list, as raised by interlocutors of the Venice Commission and ODIHR for the 2022 elections.<sup>89</sup> On the one hand, it is hardly a guarantee for minority representation that an electoral list promises to enhance the rights of national minority members. Such policy goals can also be shared or championed by non-minority parties and candidates. Advance declarations of minority policies can also be *pro forma*. It might be more useful if the criteria placed greater emphasis on objective proof of affiliation of candidates to national minorities, such as biographic data, membership in organisations promoting the rights of minorities, participation in events

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<sup>87</sup> Venice Commission, CDL-AD(2002)023rev2-cor, Code of good practice in electoral matters, para. I.2.4.b.

<sup>88</sup> It should also be taken into account that article 47 of the Constitution states that "no person shall be obliged to declare his national affiliation".

<sup>89</sup> See Advisory Committee on the Framework Convention for the Protection of National Minorities, Third Opinion on Serbia, adopted on 28 November 2013, para. 178.



organised by minority councils (e.g., speaking engagements), etc. More objective and clear criteria would also limit discretion in the decision to grant national minority status to electoral lists. The Venice Commission and ODIHR recommend providing for such criteria.

139. For the April 2022 election, the REC decided to verify if candidates had been registered in the special voter register for National Minority Councils, despite that no such criterion is mentioned in the law, and applied these checks only for certain candidates.<sup>90</sup> The REC took four decisions rejecting four different minority lists, one of which was overturned by the Administrative Court. If registration for National Minority Councils is an accurate and objective measurement of a candidate's national minority affiliation, this criterion could be included in the law and applied to all lists seeking national minority status.

140. The current system of national minority status for electoral lists does not guarantee the representation of all national minorities. In particular, the Council of Europe's Advisory Committee on the Framework Convention for the Protection of National Minorities has stated that the current system benefits mainly a few larger minorities and has recommended a revision.<sup>91</sup> In this respect, a system of reserved seats for national minorities, which is found in several other European countries, could be considered, as an alternative to the system of privileged candidacy and seat allocation quotas.<sup>92</sup> Reserved seats would guarantee representation also for some smaller minorities and would also be less prone to abuse compared to the current system. The system of reserved seats would also ensure the stability of representation of minorities, given that the republic is one constituency for the purpose of parliamentary elections, and the coefficients for the seat allocation quotas, by itself, might not adequately protect the rights of minorities which are geographically concentrated. Another option could be to allocate the mandate to the national minority list with the highest number of votes, even if any of the lists from a particular minority failed to win any seats, in case the sum of all votes for the same national minority would lead to winning a seat. That will prevent the waste of minority votes if these are spread on different national minority electoral lists.

141. Another measure to ensure minority representation is the increased coefficient for seat distribution for national minority electoral lists in Article 140. In the law applicable for the 2022 elections, this coefficient was 35 per cent. However, the rapporteurs learned that this coefficient had been changed in the past on several occasions, reducing the foreseeability for candidates. The Venice Commission and ODIHR recommend keeping the coefficient over several elections to ensure foreseeability and predictability for minority candidates, as well as the stability of election law. Most significantly, this coefficient should not be changed close to the elections.

### **E. Election dispute resolution**

142. Election dispute resolution is an essential part of democratic elections. The Code of Good Practice in Electoral Matters underlines those irregularities in the election process must be open to challenge before an appeal body.<sup>93</sup> It also states that "appeal proceedings should be as brief as possible".<sup>94</sup>

143. The existence of appeals on election results may delay the proclamation of final results, but if this process is prolonged excessively over time due to re-run elections in certain polling stations,

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<sup>90</sup> See International Election Observation Mission, Republic of Serbia, Presidential and Early Parliamentary Elections, 3 April 2022, p. 24.

<sup>91</sup> See Advisory Committee on the Framework Convention for the Protection of National Minorities, Fourth Opinion on Serbia, adopted on 26 June 2019, para. 121.

<sup>92</sup> See CDL-AD(2002)023rev2-cor, Code of Good Practice in Electoral Matters, guideline I.2.4.b.

<sup>93</sup> Venice Commission, CDL-AD(2002)023rev2-cor, Code of good practice in electoral matters, para. 92.

<sup>94</sup> CDL-AD(2002)023rev2-cor, Code of good practice in electoral matters, para. 95.

this may affect public confidence in the electoral process as a whole. Notably, during the April 2022 elections, voting at a single polling station was repeated several times, due to complaints about repeated violations of the election process, and subsequent annulment of the results. As a consequence, establishing final results of the parliamentary elections have been significantly postponed and occurred three months after the elections. This in turn postponed the establishment of the next convocation of the parliament.

144. The Code of Good Practice in Electoral Matters provides for annulment when “irregularities may have influenced the outcome, i.e. affected the distribution of seats”.<sup>95</sup> Almost all electoral systems establish the principle that if the invalidity of the vote in one or more polling stations may affect the result, a new vote will be required. In line with this, the decision adopted in Serbia to re-run elections in some polling stations is a correct solution according to international standards.

145. Normally, this decision to repeat the election affects only the MPs elected in the constituency where the new vote is required, but it doesn't have to affect the MPs elected in other constituencies. The problem arises when there is a single national constituency, which is the case of Serbia. In this case, when it's not possible to certify the result, the Parliament cannot be constituted. Even the formation of the government may be paralysed, although a technical, transitional, or caretaker government is usually well-positioned to deal with day-to-day business.

146. This problem is not caused by the extension of the deadlines for complaints and appeals (which is a positive reform and complies with previous recommendations) but (1) by the existence in the law of certain provisions that result in the automatic stop of the results proclamation process when there are pending legal remedies and (2) by the inability or lack of instruments or political will by the election administration and other relevant authorities to reduce the instances of violations from taking place. The LEMP contains automatism that may lead to a delay in the declaration of the final results.

147. Article 117 requires mandatory repeated voting in all polling stations where the result is annulled or can't be determined. Secondly, Article 119 establishes that when repeated voting is ordered, the issuance of the consolidated report by the LEC must wait for the new voting to take place. And finally, Article 121 delays the issuing of the general report of the results when there are appeals against consolidated reports.

148. Some of these automatism could be avoided by establishing the following provisions in the law:

- (1) The deadlines for all elements of the dispute resolution mechanism pertaining to the legality and legitimacy of elections or the election results on the polling stations level (including the processes launched on the basis of Articles 111, 114, 115, 116, 148, 150, 154, 156 of the LEMP), as well as recounts and the LECs' ex officio decisions on annulments of voting in a given polling station (Article 116 of the LEMP) should be made uniform and finalised by a set date.
- (2) The decision on repeat voting on the polling station level shall be validated by the REC for all annulled polling stations simultaneously. This would require amendments to Article 117 to ensure that the process is triggered for all the polling stations at once. The decision on repeating elections should be made only after the entire dispute resolution cycle is completed nationwide (as described above). The conduct of repeat voting should be required only in cases when the scope of violations, as established during the dispute resolution process, could influence the election results in the nationwide constituency, i.e. if it could in any way impact the allocation of MP seats.
- (3) In case it is established that the final results cannot be affected by the annulled voting in selected polling stations, the consolidated reports of the LECs should be accepted

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<sup>95</sup> CDL-AD(2002)023rev2-cor, Code of good practice in electoral matters, para. 96.

by the REC, excluding the affected polling station, and the REC should proceed with establishing the final result.

- (4) The law could be amended to allow the REC to fully take charge and responsibility from the LEC in case it decides to do so (for example, in the case election is annulled in a single polling station due to repeated violations of the same character).

149. The Venice Commission and ODIHR, therefore, recommend adapting the legislation so that the resolution of complaints affecting particular polling stations does not completely block the proclamation of provisional results.

150. The existence of independent adjudicating bodies is a fundamental requirement for the effective examination of electoral complaints, which is a legal obligation flowing from Article 3 of the First Additional Protocol to the ECHR and international standards.<sup>96</sup> In the Serbian model for election dispute resolution, the REC decides complaints on the conduct of elections (Article 153), and its decisions can be appealed to the Administrative Court for a final decision (Article 156). This model is common and in line with international standards, provided that the institutions are independent.<sup>97</sup> In this respect, the Venice Commission and ODIHR would like to note that the appearance of independence of the REC may be questioned in its current model of political appointment and representation, see above. As for the Administrative Court, the Venice Commission and ODIHR note that Serbia has adopted constitutional amendments to strengthen the independence of the judiciary.<sup>98</sup> These amendments are also welcome in the context of elections. In its 2007 opinion on the Constitution of Serbia, the Venice Commission concluded that the National Assembly's role in the appointment of the High Judicial Council that in turn appoints and elects judges, constituted "a real threat of a control of the judicial system by political parties".<sup>99</sup> By design, structural flaws in the judicial system that threatens judicial independence will be present in the election dispute resolution system too. The recent constitutional amendments, aimed at strengthening judicial independence in general, have the potential for a positive effect on election dispute resolution and may improve public trust in the electoral process.

151. In the 2016 Paunović and Milivojević case, the ECtHR found that the complainant had no effective remedy against breaches of the Election of Members of Parliament Act.<sup>100</sup> In that case, both the Supreme Court and the Constitutional Court dismissed the applicant's complaints without examining their merits because they found that they lacked jurisdiction to rule on the validity of a private law contract between the candidate and his party. The Venice Commission and ODIHR emphasise that the complaints and appeals system must provide an effective remedy to any breach of electoral law, including those concerning the outcome of the elections

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<sup>96</sup> See CDL-AD(2002)023rev2-cor, Code of Good Practice in Electoral Matters, guideline II.3.3.

<sup>97</sup> See CDL-AD(2002)023rev2-cor, Code of Good Practice in Electoral Matters, guideline II.3.3.a. For a discussion on the independence of judges in relation to election dispute resolution, see Venice Commission and ODIHR, Turkey - Joint Opinion on Amendments to the electoral legislation and related "harmonisation laws" adopted in March and April 2018, [CDL-AD\(2018\)031](#), paras 40-43.

<sup>98</sup> See Venice Commission, [CDL-AD\(2022\)030](#), Serbia - Opinion on three draft laws implementing the constitutional amendments on Judiciary.

<sup>99</sup> Venice Commission, opinion on the Constitution of Serbia, [CDL-AD\(2007\)004](#), para. 106.

<sup>100</sup> See Paunović and Milivojević v. Serbia, no. 41683/06, 24 May 2016, paras. 67-73.

and the MP's mandate.<sup>101</sup> The jurisdiction of the relevant courts should include all types of interference with an MP's mandate, irrespective of its legal basis and classification.

#### **F. The relationship between the President and the National Assembly in the electoral system**

152. In its 2007 opinion on the Constitution, the Venice Commission found that the Constitution established a "clearly parliamentary system" with a "relatively weak" President of the Republic and a "very strong Prime Minister".<sup>102</sup> The President, despite being directly elected, shall "express state unity" (Article 111 of the Constitution), and is called to perform a neutral function in government formation (Article 112.3). While it is not for the Venice Commission and ODIHR to define the political system in Serbia, the current lack of distinction between the President and parliamentary politics, in particular during the election campaign, indicates that the Venice Commission's 2007 assessment of the political system no longer reflects its actual functioning.

153. According to Article 109 of the Constitution, the "President of the Republic may dissolve the National Assembly, upon the elaborated proposal of the Government". While early elections have become common since 2008 (there was only one exception in 2012), it appears that, at least in 2022, the Government did not make or at least make public any proposal that elaborated on the reasons for the early dissolution of the National Assembly. It is recommended that the President only dissolves parliament on the basis of a well elaborated proposal and preferably only when necessary due to the parliamentary situation.

154. In 2022, as in 2012, the presidential and parliamentary elections were held on the same day. Neither the Constitution nor the electoral laws fix the time of the elections, except indirectly, through limitation of duration of mandates to five and four years for the president and MPs, respectively. Observations have shown that the holding of elections on the same day has given the president further advantage of incumbency.<sup>103</sup> The International Election Observation Mission for the 2022 elections found that the elections, "presented diverse political options, but a number of shortcomings resulted in an uneven playing field, favouring the incumbents." To further the constitutional aim of a strong parliamentary system where the president expresses state unity and performs a neutral function in government formation, additional measures could be considered to limit the influence of the presidential election campaign over the parliamentary race.

155. The mission report notes, "consistent reports of pressure on public sector employees to support the incumbent president and the ruling coalition and the misuse of administrative resources by state and municipal actors, contrary to OSCE commitments and international standards." Further, ODIHR's media monitoring showed that the national public broadcasters provided extensive uncritical news coverage to public officials who were also candidates, in particular the incumbent president. To ensure a more level-playing field in the election, the Venice Commission and ODIHR recommend, consideration of additional measures to prevent the misuse of public office and administrative resources in the campaign.

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<sup>101</sup> See CDL-AD(2002)023rev2-cor, Code of Good Practice in Electoral Matters, guideline II.3.3.d; [CDL-AD\(2020\)025](#), Report on Election Dispute Resolution, p.15.

<sup>102</sup> See [CDL-AD\(2007\)004](#), para. 48 and 56.

<sup>103</sup> Cf. Venice Commission, [CDL-AD\(2017\)005](#) -Turkey - Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 2017, para. 98.

## **G. Other issues**

### **1. Status of MPs**

156. Serbia has a history of strong party control over MPs. Until 2003, the Election of Members of Parliament Act provided that the mandate of an elected MP would expire if the person ceased to be a member of the political party or coalition for which list the candidate was elected. This provision was struck down by the Constitutional Court of Serbia as unconstitutional, as MPs held their mandate from the people and not the party. In 2016, the ECtHR considered the resignation of MPs in Serbia in relation to Article 3 of Protocol No. 1 to the ECHR.<sup>104</sup> In that case, the political party of which the MP was a member had required its MPs to write resignation letters in advance and submit these to the party. When a political party later submitted a letter of resignation against the MP's will, the ECtHR found that this practice was in breach of the law. In the current law, the resignation of MPs is regulated in Article 132. A resignation shall be submitted in writing, have a certified signature, and be submitted in person to the National Assembly within three days from the day of the certification of the signature. Since signatures for resignation are valid only for three days, and the letter of resignation must be delivered in person, this appears to be a positive attempt to introduce formal safeguards to ensure that an MP's resignation was made *bona fide*.

157. Despite long-standing criticism, the 2006 Constitution of Serbia maintains the provisions related to the imperative mandate.<sup>105</sup> Paragraph 2 of Article 102 of the 2006 Constitution of the Republic of Serbia provides that "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". The Venice Commission and ODIHR reiterate the necessity to revoke the provision from the Constitution, to eliminate elements fundamentally at odds with the international standards for democratic elections.<sup>106</sup>

### **2. Voting and counting**

158. The legislation foresees special polling stations in military units (Article 56.3 LEMP). This goes against the Code of good practice in electoral matters, I.3.2.xi. Special polling stations for military personnel are a means to harass voters participating there. The Venice Commission and ODIHR recommend reconsidering this provision.

### **3. Publication of opinion polls**

159. Article 6.3 LEMP stipulates that "it shall be forbidden, 48 hours before the Election Day and on the Election Day before the closing of polling stations, to publish estimates of election results ...". As the spread of information, especially in social media or the Internet, is not limited by borders, restrictions on access to public information, including on public opinion, should be

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<sup>104</sup> See Paunović and Milivojević v. Serbia, no. 41683/06, 24 May 2016.

<sup>105</sup> The 2007 Venice Commission Opinion on the Constitution of Serbia ([CDL-AD\(2007\)004](#)) in paragraph 53 called the provision "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." See also recommendation 9.10.1 of the Council of Europe Parliamentary Assembly Resolution 1858 (2012) on the honouring of obligations and commitments by Serbia.

<sup>106</sup> Paragraph 7.9 of the 1990 OSCE Copenhagen Document; 2009 Venice Commission Report on the Imperative Mandate and Similar Practices ([CDL-AD\(2009\)027](#)).

limited. Voters may get fake data, and access to accurate information could avoid misinformation of the voters right before elections.”

#### **H. The adopted law on the referendum and the people’s initiative**

160. Following the Urgent opinion provided by the Venice Commission on the revised draft Law on the Referendum and the People's Initiative,<sup>107</sup> the law on the referendum and the people’s initiative was adopted in December 2021. The main recommendations to abolish the fees for signature authentication, give the electoral commissions the power to check signatures and provide objective information to voters were followed.

161. This was also the case of the recommendation to provide that the deadlines before a new referendum can be organised on a given issue after a positive result applies in case of a negative result too. Some recommendations, however, remain to be addressed, in particular, to extend the right to appeal to all voters.

162. The law was applied for the first time very early after its adoption, to the 16 January 2022 constitutional referendum. The amendments to the Constitution were accepted with 60,24 % of the votes in favour and a turnout of 30,65 %. The result was valid since the revised law had suppressed the quorum in accordance with the Venice Commission’s recommendations.<sup>108</sup> The law was not applied on other occasions up to now.

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<sup>107</sup> [CDL-AD\(2021\)052](#), Serbia - Urgent opinion on the revised draft Law on the Referendum and the People's Initiative.

<sup>108</sup> Cf. Venice Commission, [CDL-AD\(2022\)015](#), Revised Code of Good Practice on Referendums, III.7.