Comments on the Proposal for the Law on Amendments to the Law on the Election of Councilors and Members of Parliament submitted by the Democratic Party of Socialists

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The publication was produced within the project "Strengthening Judiciary and Electoral Reform Processes" supported by the National Endowment for Democracy (NED). The views and opinions expressed in this report are solely those of the author(s) and do not necessarily reflect the views of the National Endowment for Democracy.

Introduction

The Center for Democratic Transition (CDT) is putting forward suggestions aimed at improving the Proposal for the Law Amending the Law on the Election of Councilors and Members of Parliament (LECM), which was submitted to Parliament by the Democratic Party of Socialists (DPS).

Although the Comprehensive Electoral Reform Committee (the Committee) ultimately fell short of its goals, we remain committed to our mission in society by providing our perspective on the legislative proposals that were within the Committee's remit, and on the procedure for their potential adoption.

However, it is crucial to emphasize that the CDT's engagement in this public discussion is not to be mistaken for our endorsement of a quasi-electoral reform driven by a flood of partisan legislative proposals designed for scoring political points, as it cannot replace the serious and diligent work that was required of the Committee, which, regrettably, manifested only in rare and brief intervals. On the contrary, we are expressing deep concern over this process. Should political actors persist with such political tactics, it could lead to a very dangerous outcome: a failure to amend LECM which requires a two-thirds majority, while laws requiring only a simple majority would be amended unilaterally, such as the Law on the Voter Register, the Law on Registers of Permanent and Temporary Residence, the Law on Citizenship, and the Law on the Financing of Political Entities and Election Campaigns. Given Montenegrin Parliament's track record of insufficient transparency in legislative procedures to date, there is a distinct possibility that the ruling majority may unilaterally amend key electoral laws by bypassing public consultations and democratic standards, and tailoring election rules to serve partisan interests, securing an unfair advantage in the run-up to the elections. This would undoubtedly create a highly unfavorable environment right before parliamentary and general local elections.

In principle, the DPS proposal is a synthesis of different recommendations that have been coming from the public sphere, largely based on the assumed introduction of semi-open lists, a model that enables voters to support a party slate while also casting preferential votes for individual candidates on the list. We believe that, given the current political climate, this is the right first step to take, which would over time lead toward the introduction of fully open lists, where voters can directly select all 81 Members of Parliament from the candidate pool, with adjustments permitted only to uphold the principles of gender equality and affirmative action.

We have structured our recommendations into three key groups: first, the omission of critical amendments that are vital for the legislation to achieve its full purpose and foster a more open and democratic electoral environment; second, the lack of robust safeguards for gender equality and other ambiguous provisions that leave room for potential abuse; and third, proposal for solutions that we believe could be regulated with a much higher standard of legal quality.

CDT team

1. Failure to Include Crucial Amendments Aimed at Opening the Electoral Process

Enabling Independent Candidacies

We believe that leaving out individual candidacies is a major flaw of this proposal. There is no legitimate reason for omitting such a critical issue, especially since the proposer claims that the aim is to "increase the political accountability of elected representatives before citizens, make the electoral process more transparent, and encourage greater citizen engagement in political life."

We are recalling that the current law stands in contradiction to the recommendations of the Venice Commission and ODIHR, but also the 1990 Copenhagen Document — the cornerstone of democratic elections and its globally recognized and irrefutable standards. The signatory states of this document, including Montenegro, have pledged to uphold the "right of citizens to seek political or public office, individually or as representatives of political parties or organizations, without discrimination."

It is worth considering a solution proposed in the Ministry of Public Administration's document "Concept of the Law on Local Elections": "A candidate must secure 3% of the vote to meet the legal threshold for direct election. If no candidate reaches this 3% independently, those who individually receive at least 0.7% of the valid votes remain eligible for mandate allocation as part of a single aggregate electoral list. This combined list qualifies for seats only if its total cumulative vote reaches the 3% threshold. Mandates within this aggregate list are then distributed to individual candidates based on their preferential vote ranking, with seats assigned to those who received the highest number of votes."

Adjusting Media Representation Rules for Preferential Voting

CDT maintains that if we want preferential voting to truly work, we must update LECM, specifically its rules on campaign media coverage. It is vital to provide candidates or groups of candidates from the same list with the opportunity to pitch their "personal" agendas to voters and encourage them to actively engage in preferential voting. The current provisions on media representation are designed for closed party lists and do not guarantee balanced and equitable coverage for all candidates on those lists. Unless these LECM provisions are amended, parties could potentially sideline certain candidates by effectively steering the public and affecting the outcome of the preferential vote.

Although this falls outside the immediate scope of this particular law, it is essential to consider amending the Law on Financing of Political Entities and Electoral Campaigns so as to ensure that a share of the campaign funds parties receive gets fairly distributed among all candidates on their lists. This would allow every individual candidate to actually fund the promotion of their own "personal" platforms.

Clarifying Procedures for Resolving Tie-Votes Between Candidates

The proposal fails to cover the potential situation where **two or more candidates receive an identical number of preferential votes** right at the cutoff point for winning a seat in parliament.

While highly unlikely, this situation is still possible; therefore, it is essential for the LECM to specify a procedure for deciding which candidate gets the seat when two or more candidates from the same list end up with the exact same number of preferential votes.

Possible ways to resolve this issue would be to have the State Election Commission **draw lots to choose the winning candidate, or give the seat to the candidate who was ranked higher on the original list**.

The Viability of the Deadlines for Determining Preliminary and Final Results under a Preferential Voting System Warrants Further Consideration

Because of the complicated new procedure that the election authorities, especially the State Election Commission, have to follow during vote count and mandate allocation process, it is necessary to consider whether the current deadlines for determining preliminary and final election results are attainable. At the same time, we have to keep in mind that election timelines are deemed urgent as a matter of course, so any potential extension would have to be minimal and limited to a few hours only.

2. Inadequate Gender Equality Safeguards and Other Vulnerable Provisions within the Proposal

Refine and Expand Gender Equality Provisions

The proposed changes in Article 6 acknowledge the importance of implementing the principle of gender equality - a major strength of this proposal.

A major gap remains in the provision stipulating that if “at least 40% of the elected candidates are not members of the underrepresented gender, mandates shall be assigned to candidates of that gender holding the highest number of preferential votes on the same electoral list, thereby replacing candidates of the opposite gender with the lowest number of preferential votes.” This mechanism fails to guarantee the full implementation of gender equality in scenarios where candidates of the underrepresented gender **receive no preferential votes at all**.

Therefore, the provision should be amended to specify that if preferential voting fails to achieve a 40% share for the underrepresented gender, a contingency mechanism should be applied based on the original list order. This would involve replacing the last-elected candidate from the overrepresented gender with the next-in-line candidate from the underrepresented gender, repeating this process until the mandatory 40% threshold is met

Strengthen Woman-Replaces-Woman Safeguards in Parliamentary Vacancies

In the proposed amendments regulating the termination of mandates and the filling of parliamentary and councilor seats, **no guarantee has been established** that a resigning representative from the underrepresented gender would get replaced by someone of the same gender.

This means that under the current proposal, the number of elected female MPs and councilor could drop below the initial 40% in the course of parliamentary term, which would perpetuate **existing patterns of marginalization** of women within parliamentary and political life

Ensuring Enforceability of Mandate Allocation Rules for Coalition Lists in line with Preferential Voting Standards

The proposal fails to adequately address the issue of mandate distribution within coalition lists under preferential voting conditions.

The current LECM provisions on pre-electoral alliances via joint candidate lists establish a model where the coalition agreement defines both the ranking of candidates and the subsequent allocation of mandates based on that sequence. While functional in a closed-list system, these provisions **require further clarification and supplementary regulation to be effectively implemented following the introduction of preferential voting**.

The proposed model fails to cover a very realistic scenario: Party A and Party B form a coalition and forge an agreement stating that if they win 15 mandates, Party A gets 10 and Party B gets five. However, with preferential voting, candidates from the list who win preferential votes can disrupt this agreed-upon order, potentially resulting in Party A receiving eight mandates and Party B receiving seven.

We believe that this simple example clearly illustrates the potential issue and the gap that the DPS proposal fails to address. It is essential to fundamentally re-examine how preferential voting works for coalition lists - without undermining the preferential principle itself - as an **agreement forged between parties should never override the law or the freely expressed will of the voters**.

Without addressing these issues, the rule in Article 8, paragraph 3 about how to replace a representative who resigns makes little sense, which is why we have not commented on it further.

3. Effective Alternatives for Identified Deficiencies

Abolishing Automatic Mandates for List Leaders and Establishing Preferential Vote Thresholds for Entering Parliament

CDT contends that establishing list leaders as untouchable and shielded from voter choice - as proposed in Article 6, paragraphs 6 and 7 of the amendments - raises fundamental democratic concerns. Extensive comparative analysis revealed **no precedent** for a system where a list leader enjoys absolute protection from the will of the electorate expressed through preferential voting.

This begs a fundamental democratic question: what standard or rule justifies granting **the head of a list the power to hold a completely privileged position over all other candidates?** By the very nature of campaigning, the list leader is the most exposed figure, already having a significant head start over those in the middle or at the bottom of the slate, and this proposal only widens that divide. Instead of increasing political accountability and the quality of representative democracy - as the proposer purports - it actually entrenches party-controlled power under the guise of opening up the electoral process and preventing the very partitocracy. Such a move is particularly striking coming from a party that has recently championed their own intra-party direct elections.

Conversely, many analyzed systems incorporate **specific safeguards to prevent a small, highly mobilized segment of the electorate** from exerting **disproportionate influence over parliamentary composition** relative to more passive voters that choose not to use preferential votes. A common solution is the introduction of a reasonable threshold - a **minimum percentage of preferential votes relative to the list's total votes**. Rather than stifling the affirmation of preferential voting, such a threshold serves as a vital guarantee that a small, motivated minority cannot override the implicit will of the broader majority.

Implementing such a threshold would strike an essential balance between upholding democratic norms and giving the list leader a fair opportunity to secure a mandate. However, this threshold can only work if it is combined with the gender equality safeguards outlined above.

The substantive implications of this proposal are equally critical: if adopted, it would effectively neutralize preferential voting for candidates seeking parliamentary status through affirmative action. Under the current legal framework, if no individual list from a particular minority nation reaches the general 3% threshold on its own, all lists representing this minority that garner at least 0.7% of the vote are pooled together to collectively compete for parliamentary seats - a most likely scenario where, historically, only the heads of these lists have entered parliament. Retaining the shielded status for list leaders would render any other minority candidate's chance of winning a seat based on individual merit purely theoretical, regardless of their preferential vote count.

This creates **a potentially discriminatory outcome where voters supporting minority lists are effectively deprived of the right to a meaningful preferential vote**. In this highly realistic scenario, the provision as proposed would essentially "cancel out" their individual choices.

Re-examine the Proposed Content of the Ballot Paper

The ballot paper design proposed in Article 1, while a legitimate option, could potentially lead to voter confusion, delays, or technical issues during the casting of votes - a ballot that lists the names of every single candidate from every list would be **excessively bulky and potentially several meters long**, making it difficult for voters to efficiently locate their choices and process their vote in the polling booth.

We propose an alternative 'split-ballot' design: **the left side of the ballot would feature the electoral lists in the order as established on the collective list, while the right side would display numbers from 1 to 81**. Citizens casts their vote by circling an electoral list on the left, and up to ten numbers for parliamentary elections, or five numbers for local elections that correspond to their preferred candidates. A comprehensive list of candidate names corresponding to these numbers would be prominently displayed at the polling station and within every voting booth, allowing voters to navigate the ballot more easily and exercise their civic duty without major complications.

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