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**NDI COMMENTS ON THE 1998 MINISTRY OF JUSTICE'S PROPOSED
LAW FOR ELECTION OF MEMBERS OF PARLIAMENT
OF THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA**

At the request of the Ministry of Justice, political parties and civic organizations in the Former Yugoslav Republic of Macedonia, the National Democratic Institute for International Affairs (NDI) has prepared the following comments on the 1998 Ministry of Justice "Proposed Law for Election of Members for the Parliament of the Republic of Macedonia" (the "Proposed Parliamentary Election Law" or "Proposed Law"). In January 1994, NDI provided comments on the law used to conduct the 1990 parliamentary elections and proposed amendments to that law. In July 1996, the Institute provided comments on the June 1996 Working Version of the Ministry of Justice's "Proposal for the enactment of a Law on Election of Bodies of Local Government Units and of the City of Skopje." In December 1997, NDI offered comments on "Proposal for passing the Law for Election of MPs for the Parliament of the Republic of Macedonia." Each of those commentaries was sent to ministers, members of the Republic Election Commission, leaders of the National Assembly and to political parties and civic leaders.

NDI was gratified that, in each of the previous cases, many of the Institute's comments were incorporated into the final draft laws and that dialogue was conducted among the government, political parties and citizens concerning NDI's comments and other aspects of the proposed laws. The Institute is therefore pleased to respond to the present requests for comments on the Proposed Parliamentary Election Law.

NDI formed a Macedonian Election Law Advisory Group to review the Proposed Parliamentary Election Law, as it did for each of the prior commentaries. This group is chaired by Patrick Merloe, NDI's Senior Associate for Election and Political Processes. The group also includes the following election law experts, each of whom has participated in their individual capacity, not as representatives of their respective institutions: Rafael Lopez Pintor (Spain), Professor of Sociology and Political Science at the Universidad Autónoma of Madrid; Susana Lorenzo-Giguere (USA), formerly with the United States Department of Justice, Civil Rights Division, Voting Rights Section; Lawrence Nobel (USA), General Counsel for the United States Federal Election Commission; and Simon Osborn (United Kingdom), member of the British Electoral Reform Society. NDI is grateful to each member of the group for contributing their time and valuable comments concerning the present and past Macedonian draft election laws.



Their efforts demonstrate the international community's continuing interest in supporting the democratic process in Macedonia.

NDI analyzed the Proposed Parliamentary Election Law, reviewed comments provided by the group and developed the comments presented below. NDI's earlier comments will only be repeated here where they are relevant to improving this draft. Some of the comments presented below may be based on ambiguities created by the English language translation of the Proposed Law. Just as in the previous cases, NDI's comments are offered in the spirit of international cooperation and with the recognition that no election system is perfect. The comments hopefully will assist those in Macedonia who are working to advance the democratic process by improving Macedonia's election system.

I. Public Confidence and Transparency

The Proposed Parliamentary Election Law compares favorably to international electoral standards, in most respects. In settings such as Macedonia, efforts to promote public confidence in the political process, through dialogue concerning the elements of proposed laws -- especially election laws -- is every bit as important as ensuring that the contents of the law meet international standards. The provision of opportunities for exchange among the political parties at a roundtable discussion was an important development in this respect.

The public, both individual citizens and citizen organizations, should also have ample opportunity to comment upon and contribute to the development of the law, as well as in development of the electoral model for selection of representatives contained in the Proposed Law. NDI's experience around the world shows that such measures, including periods for public comments to be submitted in writing, legislative hearings and town meetings to discuss the election model and provisions of the Proposed Law, are vital to developing public confidence in the political process. It is hoped that such opportunities for public participation in policy formulation will be employed in the development of future laws, even if there is not a chance to do so for this Proposed Law.

The Proposed Law also contains several specific confidence building provisions that incorporate the participation of political parties in election administration and make the system more open to public scrutiny. Such provisions include:

appointment of political party nominees to the State Electoral Commission (SEC)(Article 14),b Electoral Commissions (ECs) for the electoral districts (Article 16) and Electoral Boards (EBs) for the polling stations (Article 20);

representatives of the political contestants may follow the work of the ECs and EBs from the beginning of the elections to the announcement of results, and their objections must be included in the official reports from these bodies (Articles 23, 68, 82 and 88);

copies of the official reports of the EBs and ECs are to be given to representatives of the contestants (Articles 83 and 88);

results of the voting at each polling station are to be announced on the spot (Article 83);

there are explicit provisions for monitoring all activities of the campaign and election day by both Macedonian and international organizations (Article 104).

A few measures could be taken to strengthen these provisions even further, such as:

- allowing representatives of the political contestants to follow the work of the SEC, as well as the ECs and EBs;
- Articles 83 and 88 should be expanded to provide copies of the official reports of ECs and EBs to monitors from Macedonian and international organizations;
- Article 104 could be expanded to allow organizations to monitor activities concerning electoral complaints and all other aspects of the election process. Also, Article 104 could be clarified so that reference to international agreements does not restrict monitoring activities or preclude appropriate individuals (such as scholars) or organizations interested in impartial monitoring of elections;
- Articles 75 and 77 should provide explicitly that representatives of the political contestants and monitors may accompany the special ballot box to and from the homes or hospitals and be present for voting and other election procedures at military units, prisons and detention centers.

II. Election Model

The Proposed Law (Article 2) calls for selecting the 120 Members of Parliament (MPs): 85 MPs being elected from single-member districts, according to the majority principle; and 35 MPs being elected according to the principle of proportionality, based on country serving as one electoral district. The relative strengths and weaknesses of majority, proportional and mixed election systems are well documented. NDI does not take positions concerning which system best fits the needs of any particular country. This is essentially a political decision to be made by national actors. The model adopted here, however, does raise questions for comment.

Application of the Majority Principle. Article 85 sets forth requirements for election in single-member districts in a two-round system. A candidate wins the seat in the first round, if the candidate wins a majority of the votes and that number is not less than one-third of the total number of voters registered in the district. If no candidate receives a majority, or the majority is less than a third of the voters registered in the district, there is a runoff election. If there is a runoff, then all candidates that received at least seven percent of the votes cast participate in the second round.

This is a highly unusual majority system. To require a majority of votes cast and at least one-third of the registered voters creates a possibility for more runoffs than would result in a traditional majority system. Second, requiring that all candidates who received at least seven percent of the votes in the first round must participate in the runoff is rare.

Candidates that choose to withdraw from the second round should be allowed to do so, as an exercise of their right to participate -- or not to participate -- in government by standing for elected office.

In addition, the purpose of runoff elections is to narrow the field so that voters may focus their attention and choose from a smaller list of candidates. Normally, this results in the top two finishers from the first round advancing to the second. The system contained in the Proposed Law practically creates a re-run of the first round, with a first-past-the-post approach. It would be easier to administer if the Proposed Law employed a first-past-the-post system in the first round (which also would be less expensive than holding runoffs) or if only the top two candidates faced each other in the runoff.

Equality of the Vote in Majority Districts. International standards require equality of the vote. Article 21(3) of the Universal Declaration of Human Rights, for example, calls for equal suffrage. This means that the relative value of the vote of a person in one single-member district should be equal to persons in the other districts. While democratic practices vary on the application of this principle, the provision contained in Article 2 of the Proposed Law that allows for "minus 15% to plus 15%" of the average number of voters in the districts appears not to conform to best practices. Relatively large variations between districts may be acceptable in large countries, with vast geographic regions and/or large populations. In Macedonia, which is relatively small in both land mass and population, and where there are to be 85 districts, it should be possible to set smaller tolerances between district populations.

The value of one person's vote in a district that is plus 15 percent from the average would be almost a third less than the value of a person in a district that is 15 percent less. If the diluted weight (for example, plus 15 percent) were applied to districts with minority populations, the variance could also run afoul of the non-discrimination standard.

It therefore seems advisable to consider lowering the allowable variances from the average population of all electoral districts.

Application of the Proportional Principle. The 35 seats awarded according to the principle of proportional representation are to be determined with the entire country serving as one election district (Article 2) and in accordance with the D'Hondt method of seat allocation, applied for political parties that receive at least five percent of the votes cast. (Article 90) Thresholds of three to seven percent of the votes cast are used in a number of countries in the region, and the D'Hont formula for calculating seat allocation is common. The D'Hont method generally favors the

largest political parties. Other methods, such as the "Hare/greatest remainder combination" (used in Bosnia, for example) or the Saint-Lague method (used in modified forms in Denmark, Norway, Sweden and somewhat in Poland) provide greater opportunities for smaller parties. The choice of seat allocation methods is a policy question normally determined by a preference, or lack of preference, to include smaller parties in parliament.

III. Composition of Electoral Authorities

Article 13 states that members of the State Electoral Commission (SEC) are appointed by Parliament. In order to ensure the impartiality and acceptance of SEC members by a wide spectrum of the political parties, it may be advisable to consider requiring that appointment be contingent upon a super-majority vote of the Members of Parliament (for example two-thirds or three-fifths). This should establish confidence in the appointment of SEC members, which is important for the highly sensitive nature of the SEC's work, including appointing members of the Electoral Commissions in each electoral district and the announcing election results for proportional seats.

Article 14 provides that the SEC will have 11 members: the President and two members appointed from among the Supreme Court justices; three members from among the Court of Appeal judges; and five members, one each to be determined by the political parties that received the five largest numbers of votes at the last election. In addition, the Proposed Law requires that members of all electoral bodies must perform their duties "impartially, conscientiously and responsibly" in accordance with the law. (Article 22) In transitional democracies, there are often questions concerning the independence of the judiciary. With six of the members of SEC coming from the judiciary and one or more from governing parties, opposition parties may have concerns about the Commission's ability to function impartially. This can be addressed by modifying the composition of the SEC to include more opposition party appointees, or it can be addressed by building confidence through super-majority appointments and/or through transparency measures discussed in Section I of this commentary.

In addition, the provision concerning parties receiving the five highest amounts of votes in the last election should be clarified. The Article should indicate whether this means votes gained in the first or second round (or both) of the proportional balloting, or votes gained in the single member districts, or a combination. This clarification would be in line with the provision of Article 116, concerning this year's election, where it specifies using the first round of voting in the last election as the basis for determining political party appointments to the SEC.

The issue of impartiality among the Electoral Commissions in the districts and Election Boards in the precincts can be addressed in the same fashion as the SEC. In addition, Articles 16 and 20 should be clarified to address a method by which opposition parties should decide upon the two members they are to appoint to the Electoral Commissions in the districts and one member of the Electoral Boards in the precincts. It also seems advisable to reconsider the provision for only three

members of Electoral Boards. Voting procedures usually require more than three officials in the precinct.

IV. Complaint Procedures

The Proposed Law contains a number of provisions concerning objections, complaints and appeals, as well as penal law requirements for certain electoral law violations: candidate nominations and list submission (Articles 37, 101-102); campaigning (Article 42); objections concerning procedures before the Electoral Commissions and Electoral Boards (Articles 61, 68, 82 and 88); irregularities noted by voters (Article 103); annulling elections (Articles 94-95); and penal provisions (Articles 105-115).

There is no provision for objections or complaints during the processing of votes for proportional seats by the SEC. (Articles 91-92) Also there is no provision for preserving ballots and other important election materials in case of election disputes. All such materials should be preserved for a reasonable time after the election. Such provisions should be added to the Proposed Law. In addition, cross-referencing of sections related to objections, complaints and appeals would assist voters and political contestants in making use of these provisions.

V. Media

Article 43 sets forth basic provisions about the media. It places responsibility on the media for determining rules for candidate and political party access to the media during the election campaign. While freedom of expression of the media is critical in any country, in countries without a long tradition of impartial media coverage of elections it is advisable to place the power to set media access policy with the election commission or a special media oversight body.

Moreover, the issue of media fairness (accuracy, balance and impartiality) in news reporting is perhaps more important than providing media access for short messages by the political contestants. Guidelines for appropriate media behavior during the elections should be developed and published. This could be done by a special body concerned with the media or by the SEC. In addition, it is advisable to encourage media monitoring by electoral authorities, political contestants and civic organizations in order to help ensure proper media behavior.

A special complaint mechanism concerning the media also should be considered. When media access time is denied or news coverage violates the rights of a political contestant or contestants, it is important that they be able to seek immediate redress from a body (whether it be the SEC, a court or special media oversight body) that can provide an expedited process and an effective remedy, such as immediate retraction, correction or reply by the injured party.

VI. Election Resources and Campaign Financing

Article 99 states that funds for organizing the elections are to be provided from the Budget of the Republic, and they are to be placed at the disposal of the SEC. This is an important provision that helps ensure independence of the election administration. Other important provisions are found prohibition against government resources being used for the electoral advantage of any particular political contestant. (Articles 51 and 54)

Article 52 requires election campaign organizers to open a special bank account for the election campaign, to put all funds received from organizations and individuals into the account and to pay all campaign expenses from the account. Article 53 requires that a report of the total in the account and expenses paid be filed at the Parliament no later than three months after the elections. International experience with election campaign finance disclosure demonstrates that it is important to require reports during the campaign as well as after the election. This helps prevent election campaign abuses.

The report called for in Article 53 appears to set forth only the total amount spent and incurred. To be meaningful, and to allow for a review of the finances, the report should have more detail, such as where the funds came from and to whom the money was expended. In addition, there is no provision to audit campaigns. When public money is being used, audits help to deter fraud and give the public confidence that the money is not being misused.

Article 56 provides for compensation from national budget for part of the election expenses for those candidates who win election. While there is no international standard concerning this matter, there are examples where a wider basis for financial support has been provided. One example is to provide funds to all qualified candidates, and another is to provide funds to all candidates that receive a minimum percentage of the vote (for example, 10 percent). This has an advantage of encouraging serious political contestants, while not encouraging frivolous candidates.

VII. Voting Rights and Other Specific Matters

Article 4 states that every citizen with "a mental capacity" has the right to vote. International standards generally provide that persons judged by a court to be mentally incompetent or found guilty of serious crimes (felonies) may be ruled ineligible to vote. Use of the term "a mental capacity" should be brought into conformity with such standards.

In addition, voting qualification provisions in the Proposed Law do not address voting by citizens who are not present in the country on election day. While there is no requirement for extending the vote to such persons under international standards, it is common to allow voting at embassies or by other means for citizens who are outside of the country on election day. Article 4 states that "every citizen" meeting age and mental capacity standards has the right to vote. This would imply an intention to extend suffrage to citizens outside the country.

Article 64 states that voters in the building where voting takes place will be allowed to vote after



7:00 p.m. It is standard to permit all persons standing in line at the closing time to vote, irrespective of whether or not the line is inside a building.

Article 78 states that the president of the Electoral Board shall announce whether each ballot is valid or not and which candidate received the vote. This can be one of the most contentious aspects of an election. Candidate representatives should be allowed to view the ballots and appeal the president's decision to a vote of the Election Board and to challenge the determination by objection, and a perhaps a specific challenge procedure.

Article 94 addresses conditions that require annulment of voting results at a precinct and includes thresholds that must be met before a repeat is triggered by excess ballots in the ballot box over the number of voters that voted. The Article also states that voting must be repeated if the secrecy of voting is violated or there is an unjustified police presence at the polling station. These provisions should also be qualified by a threshold, such as voting will not be repeated unless these factors materially influenced results of the voting.

Article 8 provides that Members of Parliament may not be "revoked," while Article 95 sets forth specific provisions for removing MPs. This apparent contradiction should be removed. While the issue is essentially a political question, the provisions of Article 95 are consistent with international trends for accountability of elected officials.

Article 40 provides that foreign organizations and individuals may not "organize an election campaign." While it is not uncommon to prohibit foreigners from standing as candidates or from controlling political parties, it is not usual to extend this to prohibiting advisory assistance. In fact, there is a growing trend for candidates and parties to establish contacts with parties outside the country and for candidates to employ campaign consultants from abroad. Article 40 could be clarified concerning this point.

VIII. Conclusion

The Proposed Parliamentary Election Law, like the prior draft, provides a generally sound legal framework for elections. The Proposed Law contains significant provisions that incorporate international standards for fair and transparent elections, and it includes important considerations for building public confidence in the political process. The comments offered above by NDI seek to address possibilities for improvements in the Proposed Law and to overcome problems where they are presented.

NDI hopes that these comments help elected and appointed officials as well as political and civic leaders to develop appropriate provisions for the election of Members of Parliament. The Institute also hopes that the comments assist in further developing public confidence in Macedonia's electoral system. NDI remains available to provide further information and more detailed consultations.