Office for Democratic Institutions and Human Rights

COMMENTS ON THE DRAFT LAW FOR THE ELECTION OF MEMBERS OF PARLIAMENT

FORMER YUGOSLAV REPUBLIC OF MACEDONIA

Warsaw
20 November 2001

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COMMENTS ON THE DRAFT LAW FOR THE ELECTION OF MEMBERS OF PARLIAMENT FORMER YUGOSLAV REPUBLIC OF MACEDONIA

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I. INTRODUCTION

This assessment reviews and comments on the "Draft for Passing a Law on Election of Members of Parliament in the Assembly of the Republic of Macedonia",[1$$] which was submitted to the Assembly of the Former Yugoslav Republic of Macedonia (FYROM) by the government on 12 September 2001. The assessment is based on a reading and analysis of mainly unofficial English translations[2$$] of the following: (1) Draft Parliamentary Election Law, (2) Constitution of the Republic of Macedonia (1991), (3) the Law on Election of Members of Parliament (1996, amended in 1998), (4) the Law for the Election of the President (1994, amended in 1999), (5) the Law on Local Elections (1996), (6) the Law on Voters Lists and Voter Identification Cards (1996, amended in 1998) and other laws.

The current assessment is exclusively directed at the Draft Parliamentary Election Law. At the same time it submitted the Draft Law, however, the government also submitted to Parliament a Proposal for Passing a Law on the Voters' List.[3$$] The Draft Voter List Law will not be commented upon directly, but voter list-related issues in the Draft Parliamentary Election Law will be discussed herein.

This analysis was prepared by Daniel Finn, election expert. It should be noted that any legal review based on translated laws may be affected by issues of interpretation resulting from translation. This does not imply that the translations used are defective in any way, but simply that translation from one language to another occurs in the context of the different semantic rules of the two languages.

The Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe (OSCE/ODIHR) has conducted full-scale observation exercises during the most recent three elections in FYROM – the 2000 municipal elections, 1999 Presidential elections, and 1998 Parliamentary elections. The OSCE/ODIHR has issued final reports resulting from each of these election observation missions.

On those occasions, the OSCE/ODIHR has concluded that the election laws of FYROM provide an adequate basis for the effective administration of the election process. Nevertheless, the OSCE/ODIHR has identified certain serious deficiencies, which have prevented unqualified endorsement of the election processes. For the most part, the shortcomings that have been observed in recent elections in FYROM relate to administrative difficulties and, in particular, the high level of suspicious and even fraudulent activities which

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[1$$] Hereinafter "Draft Parliamentary Election Law", or "Draft Law".

[2$$] Most of the translations relied upon, including that of the Draft Law, were supplied by the Skopje office of the International Foundation for Election Systems (IFES).

[3$$] Submitted to Parliament on 12 September 2001: hereinafter "Draft Voter List Law".

have occurred regularly, but have not yet been subject to effective prevention and enforcement efforts. In addition, the OSCE/ODIHR has underlined certain difficulties due to ambiguities and inconsistencies in the relevant statutes.

The Draft Parliamentary Election Law, which is the subject of this assessment, was prepared as a result of a process intended to identify issues in the method and administration of elections, including parliamentary elections. The Draft Law reflects numerous changes that respond to previous observations and recommendations presented by the OSCE/ODIHR. At the same time, the Draft Law does not address all the points that could be improved through amendment of the current Parliamentary Election Law, not only with respect to observations previously made by the OSCE/ODIHR but also regarding other inconsistencies and deficiencies in the Law.

The following comments are submitted by the OSCE/ODIHR with the purpose of assisting the authorities in their future endeavours to further improve the election legislation of FYROM in line with the OSCE commitments contained in the 1990 Copenhagen Document on the Human Dimension. Therefore, this assessment should not be viewed as merely a critical commentary on the Draft Parliamentary Election Law or other aspects of election practice, but as a constructive contribution to the ongoing reform of election laws and procedures in FYROM.

II. EXECUTIVE SUMMARY

The Draft Parliamentary Election Law developed by the Government of FYROM would replace the existing law on this subject. The proposers of the Draft Law have identified its main advantages as including: Simplifying the system of representation through adopting a method of election based on a national contest of candidate lists held under proportional representation;[4$$] expanding the number of judges and other legal personnel on election bodies; limiting outside economic activities by parliamentarians; improving voter security by incorporating fingerprinting and ink-sprays; increasing other security especially by police; and requiring 30% female candidates on lists. In these and other aspects, including specifying channels for judicial appeals, the proposers indicate that they have responded to the OSCE/ODIHR and other observations and comments.

The Draft Law must be assessed in connection not only with the experience of previous elections, as reflected in the OSCE/ODIHR reports, but also in light of the potentially important role electoral reform could have in advancing political reconciliation between the main ethnic communities:

1) *Response to OSCE/ODIHR Recommendations:* OSCE/ODIHR reports on elections in FYROM have revealed substantial deficiencies, especially in the administrative area. Most serious is the apparently widespread resort to fraud and intimidation in elections, including by election officials as well as political parties. Less significantly, ambiguities and inconsistencies have been noted in the election laws, of which the Parliamentary Election Law is the most basic.

[4$$] An alternative method of election – continuing the current parallel system including single-mandate district as well as proportional elections – is included but not legally provided for in the Draft Law.

With respect to previous OSCE/ODIHR findings and recommendations, this assessment concludes that some significant legal issues would be resolved through enactment of the Draft Law. Numerous other legal and administrative issues would not be addressed, however. In addition, the Draft Law would not provide the basis of a comprehensive election code nor for continuous improvement of election administration – including through ongoing consultations, rulemaking, education and information, supervision and training, and coordination of enforcement.

2) *Implementation of the Ohrid Framework Agreement:* The Ohrid Framework Agreement, which sets the legal-political action plan for resolving the serious tensions between the two main ethnic communities in FYROM, contains a number of elements related to election law. These include: Use of minority languages, absentee voting (refugees and internally displaced persons), election districts, and the voter list. Unfortunately, none of these issues is directly addressed in the Draft Law. Further, the administrative districts that would be created for parliamentary elections under the Draft Law may run counter to the spirit of the Agreement, and could also create difficulties with respect to the appointment of personnel to election commissions and boards.

A further review of the provisions of the Draft Law results in additional comments and recommendations concerning a variety of other matters:

1) *Method of Election:* The choice of system for parliamentary representation is mainly a political matter, but has many implications for election operations, including with respect to the incentives for election fraud.

2) *Election Administration:* On election bodies, comments are provided about remaining deficiencies and inconsistencies in the Draft Law, including with respect to the appointment of election officials. On election procedures, comments and recommendations are made about voter recordation and security, as well as the secrecy of the vote. Numerous other issues on the proposed election rules are also commented upon, including: Incompatibilities and conflicts of interest, regular election date, election commission appointments, women's representation, candidate nominations, campaign finance, posting results, loss of parliamentary mandate, and observation.

III. BACKGROUND[5$$]

Under the 1991 Constitution, the Former Yugoslav Republic of Macedonia has a parliamentary form of government. The Constitution provides little direction concerning the system of legislative representation, specifying only that the Assembly consists of between 120 and 140 representatives elected through general, direct and free elections. The actual method and conditions of election are established through enactment of a law passed by an absolute majority of the representatives.[6$$] Ordinarily, the term of parliamentary mandates

[5$$] The material in sections A-E of this Part is derived from IFES, "Reform of Election Laws and Procedures in Macedonia" (D. Finn, Consultant), Skopje, June 2001.
[6$$] Constitution, Art. 62.

runs for four years. Elections for new mandates are held within the last 90 days of the regular term of an Assembly, or within 60 days of its dissolution.[7$$]

A. Method of Election

The main law establishing the legislative basis for parliamentary elections is the Parliamentary Election Law of 1996, as amended in 1998. Several other laws apply either generally or to different kinds of elections, including the Law on Voters Lists and Voter Identification Cards (1996, as amended in 1998), the Law on Political Parties (1994), the Law on Local Self-Government (1995) and the Law on Territorial Division (1996).

The current Parliamentary Election Law established a so-called "parallel" system of representation in the Assembly, under which 85 representatives are elected from single mandate geographical districts (SMD), and 35 are elected through nation-wide proportional representation (PR) based on party lists, for a total of 120 Members of Parliament (MPs).

Under the current law, to secure victory in the first round of election in a SMD, a candidate must receive a majority of the votes cast and a total number of votes which constitutes at least one-third of the number of registered voters in the district.[8$$] Also under the current law, to participate in the allocation of seats according to PR, parties which have submitted candidate lists must obtain 5% of the total number of votes cast in the national PR contest.

B. Election Administration

As in many other countries in the region, the structure of formal election administration in FYROM has three levels:

1. *State Election Commission*: According to the current Parliamentary Election Law, the State Election Commission (SEC), is comprised of a President and eight members, plus their deputies, who are appointed by the Assembly for four-year terms (Art. 12). The President and two other members, together with their deputies, must have professional legal qualifications and experience, and are selected by Parliament upon the recommendation of its Commission on Elections and Appointments. A further six members, plus deputies, are proposed half each by the ruling and leading opposition parties.[9$$]

   The SEC is primarily responsible for applying election law and taking necessary administrative actions, including issuing instructions.[10$$] It appoints the membership of other election commissions and it has the power to resolve complaints and announce the results of an election. For national PR races, it also registers candidate lists and determines the results.

[7$$] *Id.*, Art. 63

[8$$] Parliamentary Election Law, Art. 88

[9$$] Parliamentary Election Law, Art. 13. In its current form, the law appears to grant full membership to the deputies. This raises issues concerning whether they should have the power to vote at all, only when their principal is absent, or all the time.

[10$$] *See id.*, Art. 27.

2. *Election Commissions*: Election Commissions (EC), formed to conduct parliamentary elections in each election district, are comprised of a president, four members, and their deputies and are appointed by the SEC. The president and his deputy are required to have legal qualifications and experience, and they are appointed for four-year terms. The secretary is appointed by the president of the Election Commission and must have legal training. ECs are currently established for each of the 85 parliamentary election districts.[11$$] They now receive nominations and determine the results of elections conducted in single mandate districts, but with respect to national PR races forward their results to the SEC so that it may determine the winning lists.

3. *Election Boards*: Polling Election Boards, or Election Boards (EB), are formed to carry out election functions in each polling station. For parliamentary elections, EBs are comprised of a president, four members and their deputies.[12$$] They are appointed by the relevant EC 15 days prior to the election. The four members are proposed by the parties who constituted the ruling and main opposition group in Parliament as a result of the most recent parliamentary elections. Under the present law, all members of the EB are obliged to be residents and voters in the voting precinct where the polling station is located.

C. International Observation

The OSCE/ODIHR has conducted election observation missions in FYROM on three occasions[13$$] – for the 1998 parliamentary elections; 1999 presidential elections; and the 2000 municipal elections. In general, the final reports issued by the OSCE/ODIHR on previous elections in FYROM reflect ongoing improvement in election practice, but also document continuing problems in election administration. The more detailed observations made by the OSCE/ODIHR on matters related to election law and procedures, and the recommendations made thereon, are discussed further in Part IV of this assessment.

1. Observation of 2000 Municipal Elections

The OSCE/ODIHR's report on the 2000 municipal elections concluded that the conduct of these elections "showed improvement", but nevertheless "fell short on a number of international standards for democratic elections". The main reasons cited for the latter conclusion were OSCE/ODIHR's findings that the elections process "did not truly meet the country's OSCE commitment to conduct elections free from violence and intimidation, and to safeguard the secrecy of the vote."

The OSCE/ODIHR noted that the elections occurred in a "calm and orderly manner in the majority of municipalities, and the process was improved during the second round". However, it was also underlined that "election days were marked by tension, major irregularities, and acts of intimidation and violence at a number of polling stations".

[11$$] *See* Parliamentary Election Law, Art. 2; *also* Law on Electoral Units for Election of Members of the Parliament of the Republic of Macedonia, 1998.
[12$$] *See* Parliamentary Election Law, Arts. 19-22.
[13$$] OSCE/ODIHR also conducted an observation of the 1996 local elections; *see* OSCE/ODIHR; Local Elections, Former Yugoslav Republic of Macedonia; 17 November, 1996; Final Report; 3 pp.

The report underlined that the Law on Local Elections had a number of shortcomings and inconsistencies and that the role of the SEC was not clearly defined in the Election Law. In addition, it was noted that the SEC took a restrictive approach to its duties, which led to problems with regard to uniform interpretation of the law and election procedures.

2. Observation of 1999 Presidential Elections

For the 1999 Presidential elections, the OSCE/ODIHR final report concluded that they were held "mostly in accordance with OSCE commitments." While the elections were found to have been "built on many positive aspects of the 1998 elections," voting in some parts of the country was reported to have been "marred with violations" during the second round.

With respect to the Law for the Election of the President (1999), which depends in part on the institutions created under the Parliamentary Election Law, the report noted that a "broad political consensus" on its provisions had "contribute[d] to a solid legislative base" for the elections. The report also found that there were significant ambiguities in the Presidential Election Law, and that representation of the parties on election commissions did not reflect their strength as demonstrated in the previous parliamentary elections. The report emphasized, however, that the SEC had issued a number of administrative instructions that strengthened the election process.

In terms of the election process itself, the final report assessed that it had been "generally carried out according to the law". Irregularities were observed in some polling stations, however. During the second round, "serious violations" were observed in certain regions. Extremely high reported voter turnout also raised concerns about the extent of fraud that may have occurred.

3. Observation of 1998 Parliamentary Elections

The OSCE/ODIHR final report concluded that the 1998 parliamentary elections represented a "significant improvement" over previous elections. An "important aspect" of the improvement resulted from the new election law, which was based on a broad political consensus in Parliament. Nevertheless, some parties expressed concerns about certain aspects of the law, and some articles were found to lack clarity, leading to conflicting interpretations.

Some concerns were raised by the parties concerning the voter list and voter cards, but these decreased as the process unfolded. "Some irregularities" of various types were reported, especially in two districts. Instances of group and proxy voting, however, were "widely" observed.

The final report also criticized the uncoordinated publication of results by the SEC and district election commissions. The lack of clarity in the parliamentary election law concerning the criterion for first-round victories was found especially problematic.

Lastly, the OSCE/ODIHR report concluded: "It is important that a number of the problems in the management of the election are addressed, some articles of the law are clarified, and the problems experienced in the behavior of some candidates and a laxity in the voting process in some districts, are dealt with."

D. Government Working Group on Election Laws

In order to address deficiencies noted in the legislative framework for elections in FYROM, and to enhance the process of political reform and reconciliation, the FYROM Government initiated early this year a process leading to amendment of the election laws. In particular, the Ministry of Justice formed a "Working Group for determining the necessity of changing legal regulation in the area of elections and for preparing laws" (hereinafter "Working Group").

The instrument establishing the Working Group[14$$] did not specify definite objectives in terms of the scope of its work. The Minister of Justice chaired the Working Group. In addition to its Chairman, a senior official of the Ministry, seven permanent members and six part-time members were appointed.

On 20 June 2001, a public meeting was held in Skopje on the two draft laws on the parliamentary elections and the voter list prepared by the Working Group. At that meeting, presided over by the Minister of Justice and attended by members of the Working Group, an opportunity was provided to political parties, both parliamentary and non-parliamentary, government officials, and others to comment on the drafts.[15$$]

The two draft laws prepared by the Working Group – the Draft Parliamentary Election Law and the Draft Voter List Law – were formally proposed to Parliament by the Minister of Justice on 12 September 2001.

E. The Ohrid Framework Agreement

Fighting continued during the spring and summer of this year between government security forces and ethnic Albanian insurgents, most of whom identified themselves as associated with the National Liberation Army (NLA). As a result, efforts to restore peace and order continued and accelerated on the political side. With the active support and encouragement of the international community, the leading ethnic Macedonian and ethnic Albanian politicians continued and intensified their political dialogue. Their talks were aimed at a set of measures to improve the status of the ethnic minorities within society in FYROM.

On 13 August 2001, following a series of talks in the city of Ohrid, the participants signed a Framework Agreement (FA) to address the concerns of ethnic Albanians. The Agreement contained a set of policies, and annexes on specific implementing actions, including Constitutional Amendments (Annex A), Legislative Modifications (Annex B), and Implementation and Confidence-Building Measures (Annex C). Several aspects of each annex are pertinent to assessing the Draft Parliamentary Election Law. These will be identified here and discussed further in relation to specific issues about the Draft Law in a later section.

The following items, among others, in the FA should be kept in mind while reviewing the Draft Parliamentary Election Law:

[14$$] Ministry of Justice, Decision No. 10-54/1 (11 January, 2001)

[15$$] The International Foundation for Election Systems (IFES) has prepared a transcript of the proceedings; *see* IFES, *Public Discussion* (Draft, 49 pp.).

- The provisions regarding the use as an official language of any language, other than Macedonian, spoken by at least 20 percent of the population, will affect a wide range of government operations, including elections. Under Annex B, the Parliament is supposed to make the necessary legislative amendments by the end of its current term;
- Annex C requires early parliamentary elections to be held by 27 January 2002, and that international observers, including the OSCE, be invited;
- There is to be a new national census by the end of 2001. A broad consensus among all political parties, reached after the signature of the FA, has resulted in the postponement of the census to April 2002. The results of the census could affect various election operations, including the voter list, municipal boundaries, and election districts;
- A revised Law on Election Districts should be adopted by the end of 2002, which *inter alia* would follow "the principles set forth in" the Parliamentary Election Law;
- A new Law on Local Self-Government should be adopted within 45 days of the signing of the FA. By the end of 2002, a new Law on Municipal Boundaries shall also be adopted; and
- Many refugees and internally displaced persons (IDP) have not yet returned to their homes in former conflict zones, although the parties to the FA are committed to expedite this process.

F. Main Features of the Draft Laws

The main features of the Draft Parliamentary Election and Voter List Laws, as outlined in the Explanation accompanying both drafts, were discussed at the public meeting organized in Skopje in June 2001. These features are briefly presented in this section.

1. Method of Election: The method of election to Parliament would be changed from the current parallel system to a nationwide contest under proportional representation (PR) rules. The legislative threshold for winning seats through the national PR contest would be reduced to 3% from the current 5%.

   The Draft Parliamentary Election Law also proposes an alternative method of election, a modified parallel system under which 60 parliamentarians would be elected from SMDs and the remaining 60 through national PR. This proposal is described exclusively in Article 2 of the Draft Law. Should this alternative be accepted, other provisions of the Draft Law, designed for a purely PR system, would have to be changed in order to make it compatible with the proposed parallel system.

2. Election Bodies: The SEC, ECs and EBs would be expanded and their core memberships would be constituted of judges and other legally-trained persons. The leading governing and opposition parties would retain the right to designate voting members.

3. Regular Election Date: An attempt is made to provide for regular parliamentary elections to occur at the end of October every fourth year.

4. Professionalism in Parliamentary Service: Greater professionalism is sought for MPs by expanding the range of prohibited incompatibilities and conflicts of

interest. On the latter point, parliamentarians would be prevented from engaging in economic activities for personal gain.

5. Election Complaints and Appeals: Numerous provisions have been modified in order to clarify the time periods and channels for filing and receiving replies concerning election complaints and appeals.

6. Voter Identification: Issuance and use of voter cards (VC) would be eliminated.

7. Voter Security: Voters would be required to place their fingerprint next to their entry in the voter register at the place of voting. In addition, provision is made for voters receiving ballots to have their finger sprayed with invisible ink.

8. Violations at Polling Stations: The presence of police around polling stations would be increased. Inadequate or improper police activities, or the abuse of cell-phones and pagers by EB members, would provide a basis for annulment of results at a station.

9. Set-Aside for Female Candidates: Each list of candidates for parliamentary election would have to include 30% women candidates.

10. Absentees: There is no provision for absentee voting, including by citizens overseas, since no means exists to register them. An earlier proposal to permit absentee voting at diplomatic facilities overseas was omitted.

IV. COMMENTS AND RECOMMENDATIONS

A. Implementation of the Ohrid Framework Agreement

1. Language Issues

Under the Framework Agreement, provisions are to be made for the use of minority languages as official languages in several ways, including some that would directly affect the administration and conduct of elections:

- In individual communications with central government authorities;
- In government operations in local jurisdictions where 20% or more of the population speaks a language other than Macedonian; and
- On official personal documents.[16$$]

The use of languages is to be addressed by the Assembly which is required by the end of its term to "amend … all relevant laws to make their provisions on the use of languages fully compatible with" the FA (Annex B, Sect. 8).

The Draft Parliamentary Election Law does not address, either directly or indirectly, issues arising from the provisions of the FA related to official languages. This is surprising, since plainly the provisions noted above would affect many election operations. In addition,

[16$$] *See,* FA, Part 6.

enactment of a new Parliamentary Election Law would provide an opportunity for the Assembly to revise the law taking into account the provisions of the FA at once.

It is difficult to identify all the matters regulated in the Parliamentary Election Law that would be affected by the new linguistic requirements. Some, which come to mind, include:

- Use of the alphabet in voter registration and voter ID documents;
- Proceedings of election bodies;
- Ballots;
- Election notices;
- Other election materials;
- Public information and voter education programs;
- Campaign materials and activities.

Issues concerning the use of minority languages in election operations come up regularly around the world. Normally, such language issues are addressed through legislation, administrative regulations or, sometimes, judicial action.

Due to the specific needs of election administration, the language issue is an especially complex one that should be resolved as part of the amendment of election laws. It is understandable that the proposer of the Draft Law on Parliamentary Elections was unable to address language issues, because they are not only complex but also very controversial. Nevertheless, in the near future, the Government will have to issue policies and perhaps submit a major legislative package to bring the laws into compliance with the above-described provisions of the FA.

The OSCE/ODIHR recommends that the legislators identify the linguistic issues concerning elections that are presented by the FA. Furthermore, the OSCE/ODIHR recommends that the legislators address those issues at this stage, including relevant provisions in the Draft Law, to adopt a new electoral legislation fully compatible with the principles introduced by the FA.

2. Absent Voters

Voters in FYROM may currently vote only in their assigned polling stations, as there is no provision for absentee voting. A proposal to accommodate FYROM citizens temporarily located overseas by permitting them to vote in diplomatic facilities in countries where they are located was developed by the Working Group, but not incorporated into the Draft Parliamentary Election Law.

The lack of a general provision for absentee voting, including for those temporarily out of the country is unfortunate since these persons become disenfranchised for that period. A regular procedure for voting overseas, at least in a limited number of jurisdictions, would address that problem while also helping to deter vote fraud at home. Recording these persons' votes overseas would enable examination whether their entries in voter registers in their home precincts were marked as having received ballots in the election. Also, the presence of the names of so many absent citizens in the voter list makes it easy for unscrupulous persons to stuff ballot boxes in the areas where these individuals came from.

The drafters have explained that the overseas voting provision was dropped due to the unfeasibility of registering FYROM citizens abroad. In addition to other difficulties, it would be difficult to establish whether such persons were temporarily or permanently residing overseas.

Related to the FA in particular, however, are the rights of voters who have become refugees abroad or internally displaced persons (IDP's) within FYROM as a result of the recent conflict and continuing social tension. As noted previously, the FA calls for "all parties [to] work to ensure the return of refugees … and displaced persons". For an early parliamentary election, however, it is possible that such people may not yet have returned to their former areas of residence in FYROM.

It is true that in other countries, including other former Yugoslav republics, special measures have been undertaken – sometimes with international assistance – to permit voters to return to their home areas on election day in order to cast their votes. For the most part, such activities have been relatively peaceful and successful.

The OSCE/ODIHR recommends that the issue of voting by persons who are currently refugees or IDP's be reviewed in connection with the discussion of the new Parliamentary Election Law. Various solutions to grant the right to vote for these groups could be considered, including special absentee voting procedures, as well as programs to allow voters to return to their home areas on election day.

3. Election Districts

A provision of the FA requires a new Law on Election Districts to be adopted before the end of 2002 (Annex B, Sect. 6). This redistricting exercise should be carried out "taking into account the results of the census and the principles set forth in the Law on the Election of Members of the Parliament". Several comments appear to be in order based on this provision.

First, it would appear that the negotiators of the FA expected parliamentary elections to continue to be based, at least in part, on election of some members from SMDs. Otherwise, why call for a new Law on Election Districts? A question is raised, therefore, whether the national PR system for electing parliamentarians, which is the main alternative contained in the Draft Parliamentary Election Law, is consistent with the spirit of the FA.

Second, it is possible that the negotiators only intended to provide for new boundaries for the jurisdiction of election commissions, which previously were formed at the level of election districts because they managed SMD as well as national PR elections. If this is true, then it appears that the negotiators must have been very concerned about the boundaries and characteristics of election districts, a concern which does not appear to be addressed by the limited treatment of this issue in the Draft Parliamentary Election Law.

Third, the FA refers to "the principles" set forth in the Parliamentary Election Law, which would be replaced by the Draft Law now under consideration. Aside from the identification of regions in which ECs would be formed, the only principle on this subject in the Draft Law is in Alternative Art. 2(3). That provision would change current law by reducing the permissible variation in the population of election districts from 10% to 7%.

Fourth, under Art. 15 of the Draft Law, ECs would be created not for election districts as such, but for a list of 35 named municipalities (34 plus the Center). These "municipalities" are actually those established under a previous law. Under the Law on Territorial Division of 1996, currently in force, the old municipalities were subdivided into 124 (123 plus Skopje) new municipalities. Legally, these are the current municipalities in FYROM, for which local elections were conducted in 2000.

It is understood, however, that the new smaller municipal structures have not always been fully implemented due to resource and other problems. In addition, the current number of legally established municipalities would be unnecessary and unwieldy to be used as administrative districts for elections conducted under a national PR system. Finally, the current legal structure of municipalities will in all probability change as a result of a new Law on Municipal Boundaries required by the FA.[17$$]

It is understandable, therefore, that the proposer of the Draft Parliamentary Election Law decided to revert to a simpler structure in order to facilitate the upcoming elections. The specific legal problem has been addressed by the drafters, who specified in this article that the named municipalities would "include the municipalities that came out of them, according to the [1996] Law …".

Fifth, it would seem that unfortunately a great many issues will arise as a result of the proposal to return to the former municipal structure as the basis for regional election administration. Not only will there be linguistic issues presented as a result of the mixed ethnic composition of the old municipalities, but also questions about the provisions related to the residence of election officials in these areas.

The OSCE/ODIHR has commented, in previous observations, that limitations on residence of EB members has sometimes prevented party designees on EBs from being present at polling stations in areas where the party is not represented. Larger jurisdictions for the ECs might alleviate that problem, but could create another issue about whether the ethnic or political majority in a particular "municipality" was using that status to pack EBs in the district with its own sympathizers. This issue could cause considerable resentment among minority voters and their politicians.

For example, Art. 18(1) of the Draft Law provides that the president of an EC and his deputy "as a rule, shall be from the territory of the municipality determined in Article 15 paragraph 1". Presumably, the "municipality" referred to is one of the named ones. With such large administrative districts, however, the president and deputy would in all probability not be viewed by the populations of smaller subdivisions as being ethnically or politically representative of their particular areas.

On the other hand, Art. 19 of the Draft Law provides that the president of an EB and his deputy need no longer to come from the election district in which the polling station is located. This could permit ECs to "load" EBs with their ethnic or political sympathizers, even in areas with a different ethnic and political composition. Undoubtedly, this would be viewed as unfair by many voters in these localities.

[17$$] FA, Annex B(3)

It is true that new language in Art. 22 of the Draft Law requires not only the presidents and their deputies, but all members of EBs to have "residence in the territory of the municipality they are nominated for." But again it is not clear what "municipality" is being referred to. And if it is the more restrictive meaning (smaller, current "municipality" rather than larger old municipality), then it creates the problem noted earlier by the OSCE/ODIHR with respect to national political parties recruiting qualified designees in areas where they have few supporters.

Last, it should be noted that while the Parliamentary Election Law is referred to in the FA, there are no specific, mandatory provisions directly related to it. New laws are required to be adopted on local government, including a law on local elections, pursuant to the constitutional amendments in Annex A and the legislative modifications in Annex B. Their adoption would require not only a simple majority vote in Parliament, but a qualified majority including "a majority of the votes of the Representatives attending who claim to belong to the communities not in the majority in the population of Macedonia."[18$$] Annex B calls for a revised Law on Electoral Districts, but not amendment of the Parliamentary Election Law itself. In addition, the latter laws would not be subject to any additional qualified majority requirement, although the existing constitutional requirement of an absolute majority for parliamentary election laws would continue to apply. [19$$]

4. Voter List Issues

The FA, in section 3.2, requires a new census to be conducted under international supervision by the end of 2001. As noted earlier, the date for the census has been postponed to April 2002. According to the FA, the results of the census are to be used in establishing new municipal boundaries by the end of 2002.[20$$] The census, and also the "principles set forth in" the Parliamentary Election Law are also supposed to govern the establishment of election districts by that time.[21$$]

Aspects of the census might affect compilation of the voter lists by the responsible government agencies. Despite this factor, the Draft Voter List law, which as a whole is beyond the scope of the current assessment, was largely developed prior to negotiation of the FA and does not appear to take into account any effects on the voter lists process including from the upcoming census.

B. Response to Previous OSCE/ODIHR Recommendations

As underlined earlier, the three most recent OSCE/ODIHR election observation missions in FYROM have noted serious issues in election law and administration, as well as conduct during the elections by election officials, parties and others. This section will consider the major recommendations made by OSCE/ODIHR as a result of its observations of each election, and whether and to what extent the Draft Law addresses them.

[18$$] Annex A, proposed constitutional article 114(5)
[19$$] Constitution, Art. 62(5)
[20$$] Framework Agreement, sec. 3.2 and Annex B(3)
[21$$] *Id.*, Annex B(6)

1. Report on 2000 Municipal Elections

- "The SEC should have a stronger mandate to provide decisive authority over the election administration."

  This recommendation was made primarily since the SEC took the position during the recent municipal elections that it did not have statutory authority to issue instructions concerning interpretation and implementation of the Law on Local Elections. This specific aspect is not addressed in the Draft Parliamentary Election Law.

  It is perhaps understandable that this recommendation is not addressed in the Draft Law, since the drafters worked mainly on parliamentary elections and the voter list. The Parliamentary Election Law contains many provisions related to other election laws, primarily the Presidential Election Law. It also establishes basic election institutions, such as the SEC. In this sense, the Parliamentary Election Law serves at least as a model for the administration of elections in FYROM. It would appear advisable in this connection to clarify and expand the powers of the SEC – established under this Law – with respect to interpreting and implementing election laws.

  In fact, little additional authority would be granted to the SEC through the Draft Parliamentary Election Law. Art. 27 of the Draft Law, which would supplement the same article of the current law, adds only three specific responsibilities related to management of the voter lists, application of ink spray to voters, and publicizing the locations of polling stations. The SEC still would have no explicit grant of general rulemaking authority, except that of the current provisions, which *inter alia* give it the responsibility to "take care of the legality of the preparation and carrying out of the elections and give instructions" and "perform other functions provided by law".[22$$]

- "The various election laws and procedures should be integrated, preferably into a single election code."

  The Draft Law does not make any significant progress toward this goal.

- "Standardized training should be introduced for election officials at all levels."

  The Draft Law does not make any significant progress toward this goal, either with respect to parliamentary elections or other elections.

- "Legislation regulating the State media should be expanded and strengthened to ensure independent, balanced coverage in news and other programs, with an appropriate enforcement mechanism."

  The Draft Law would make some changes to the current Parliamentary Election Law with respect to control of media activities. Art. 45(2) of the Draft Law adds that the decision by Parliament about rules for equal media presentation would be based "upon a proposal of the Broadcasting Council". This proposal, while welcome, does not address the entire problem of balance in state media operations; it also does not create a new enforcement mechanism.

  In the absence of an administrative mechanism, enforcement of sanctions against media violations will continue to be through civil proceedings against media

[22$$] Draft Law, Art. 27, paragraphs (1) and (21). Current law, Art. 27, paragraphs (1) and (18).

organizations and their editors. The main provisions on this point, including the specified financial penalties, would not be changed through the Draft Law.[23$$]

- "National and local authorities, as well as political parties, should take steps, including more timely and decisive legal enforcement, to ensure that elections are free from intimidation and violence and that the secrecy of the ballot is safeguarded."

  Art. 68(3) of the Draft Law adds, "The polling station is secured by the police during the conduct of voting." It is believed that this provision is intended to require a regular police presence only outside the polling station during voting hours, but a new exception has also been added (Art. 68, par. 5) to the prohibition on armed persons within polling stations.

  The presence of police outside polling stations might be valuable in deterring violence and intimidation against voters in the vicinity. Inside the polling station, similar practices can be deterred or responded to by calling the police in, which is provided for under Art. 68(4).

  Two other threats to the safety and tranquility of the vote at polling stations must be noted: the presence of unauthorized persons, and communication by persons outside to those within the station. In this respect, the Draft Law adds some useful proposals, but the drafting could be revised further.

  With respect to unauthorized persons, there is still no overall prohibition on the presence in polling stations of persons who are not specifically authorized to be in attendance. The closest language in the Draft Law (Art. 68, par.2) establishes that, "The electoral board may remove any person disturbing the peace and order of the polling station." New Art. 93 would, however, make the presence of "persons not related to the conduct of the elections" a basis for annulling the results at polling stations.

  The Draft Law also addresses at several points a new threat to vote tranquility as well as security: the use of pagers (beepers) and cell phones within the polling station. This is taken up in the articles about suspension of balloting at polling stations (Art. 69) and annulment of results there (Art. 93). These are useful provisions, but unfortunately the basic reference in Art. 69(4) speaks only of the "abuse" of such devices "by the electoral board members" themselves.

  OSCE/ODIHR concern about ballot secrecy has derived from the fact that ballot papers issued to voters are serially numbered, and often printed on poor quality paper that might be read through even when folded for insertion into the ballot box. Unfortunately, Art. 64(3) of the Draft Law continues to provide for ballot papers to be serial-numbered.

  In view of the serial numbering of ballot papers, the only protection for voters is that the papers should be given to them in a way which prevents associating a specific ballot with a particular voter. In a previous election, the SEC issued an additional instruction to prevent this. Unfortunately, the Draft Law, in Art. 74(2), merely repeats current law, which is that the voter be issued the ballot "in such a way, that the electoral board members do not see the serial number".

[23$$] *Compare* Draft Law, Arts. 107 and 108, *with* current law, Arts. 112-113.

2. Report on 1999 Presidential Election

- With respect to *legislation*, OSCE/ODIHR recommended clarification of the articles of the parliamentary law relevant to presidential elections; reconsidering the deadlines for appeals; and clarifying what evidence is required to support electoral complaints.

  On the occasion of the 1999 Presidential Election, OSCE/ODIHR's observations on the Parliamentary Election Law mainly related to the appointment of party designees to the SEC and ECs and ambiguity concerning whether the parties should be selected according to their share of the vote in national list races under PR or also the votes they received in the SMD elections.

  For elections to follow the upcoming parliamentary elections, these issues would be resolved under the Draft Law. Party designees appointed to election bodies would be selected from the main governing and opposition parties as determined at the most recent elections. In addition, since the main alternative method of election is national list races under PR, the ambiguity about which vote totals would be relevant would also disappear.

  For the upcoming parliamentary elections themselves, however, the situation is not so clear. Under the transitional provisions of the Draft Law (Art. 116), the parties from the opposition entitled to designate members of election bodies would be those which in the last election (1998) "won the largest number of votes in the proportional list". But the parties from the governing camp would be those which "won the largest number of votes", without a limiting reference to the PR races. Assuming that this formulation was intended to have significance, then it must be understood that it was drafted to ensure that certain parties were included from representation on election bodies based on different criteria.

- With respect to *administration*, OSCE/ODIHR recommended expansion of party representation on election commissions; comprehensive training for polling board members; and enforcement of the obligations of election workers in case of breach.

  The Draft Law does not provide for additional representation of parties on election bodies, which remains limited to the leading governing and opposition parties. Indeed, rather than broadening party representation on election bodies, the Draft Law would actually increase the ratio of non-party to party-designated members. The number of independent members would be increased by expanding the number of judges, from the Supreme Court and Courts of Appeals on the SEC, the Primary Court on the ECs and lawyers on the EBs. Training and enforcement issues are not directly addressed.

- On the subjects of *voter education* and *registration*, OSCE/ODIHR recommended disclosure of the details of uncollected voter cards; and a thorough education campaign against proxy and family voting.

  The issue of uncollected voter cards (VC) would disappear if, as proposed in the Draft Parliamentary Election and Voter List Laws, the VC were eliminated.

There is no specific provision authorizing additional educational efforts against proxy/family voting, although such a program could be authorized as part of the Financial Plan proposed by the SEC (see Art. 25,2). The problem in this respect is that the limited functioning of the SEC between election cycles has largely prevented the development of effective public information and voter education programs.

Art. 48 of the Draft Law could be helpful with respect to voter education programs. That article would now state that the State media would "have an obligation to inform the citizens of the way and technique of voting without compensation".

- On *media*, OSCE/ODIHR recommended additional legislation on print media and the special responsibilities of state media.

  There would no be major change in this respect beyond what has been discussed previously.

- On *voting and counting procedures*, OSCE/ODIHR recommended improved control of proxy/family voting and of intimidation by party activists in or near polling stations; and more effective sanctions against all actions which threaten the integrity of the vote.

  With respect to group voting, Art. 72 of the Draft Law continues the provision of the current law, specifying that "voting is carried out in person at the polling stations". Clearly, combating the widespread practice of group voting will rely on voter education, training and supervision of election workers, and enforcement against violations. Improved training as well as voter education are not directly addressed by the Draft Law, but could potentially be authorized as part of the Financial Plan for the election referred to earlier.

  Monitoring of election workers is also not directly addressed in the Draft Law, but could perhaps be undertaken by election bodies, if there were sufficient funding available to support such efforts. Otherwise, monitoring of activities at polling stations must remain the responsibility of EB members, party designees on the EB if they are present, as well as domestic or international observers.

  A new penalty provision is added in Art. 115 of the Draft Law. This provision establishes financial penalties (MKD 40,000-50,000) for persons who commit violations at polling stations, including those who "vote for other persons or on behalf of another person", and also in several other situations. These include persons who are "abusing the usage of pagers, cell phones or other communication devices," obstruct the police or cause disorder.

  Certain further deterrents against violations in and around polling stations have been included in the Draft Law, such as the provisions of Art. 69 for mandatory suspension of balloting in case of certain violations like failure of the police to maintain order, presence in the station of "persons who are not connected with the conduct of the voting", or abuse of communication devices, but not group voting.

  Art. 93 of the Draft Law would also expand the grounds for annulment of the results in polling stations in which violations have occurred. This would include cases in

which group/proxy voting, abuse of communications devices, unauthorized persons, inadequate policing or interference with police occurred. The annulment is not automatic, but would be the subject of a decision by the relevant EC.

While the Draft Law makes certain improvements under this category, it must be said that the entire issue of preventing vote fraud and other violations at polling stations seems to involve more than legal changes. Based on the widespread instances of such practices which have been observed in the past, it would appear that this issue will require a concerted and large-scale program to address them through educational programs, administrative actions and determined enforcement efforts.

3. Report on 1998 Parliamentary Elections

- Some articles (especially Art. 88 on the "*majority" needed for first-round victory* in the geographical races) of the parliamentary election law require clarification.

  Under the main method of election – a national list PR contest –proposed in Art. 2 of the Draft Parliamentary Election Law, the number of mandates won by a party would depend solely on the total number of votes it received, provided the legislative threshold was met. The second alternative presented in Art. 2 of the Draft Law is for continuation of a parallel system of representation, with mandates awarded as a result of both national PR and SMD races.

  The alternative, parallel system presented in Art. 2 of the Draft Law is not completely worked out in the bill. Therefore, it is not clear whether a second-round election system would be held in an SMD race if a "majority" of the votes were not obtained by the leading candidate. If so, then the issue raised on this point by OSCE/ODIHR in its report on the 1998 elections would need to be resolved. It has been reported, however, that even if the parallel system is continued, second round elections will be eliminated in favor of victory to the candidate with a relative majority of the votes.

- The provisions on ballot validity (Art. 83) should be amended to allow ballots to be counted provided the *voter's preference* can be clearly determined.

  After the 1998 parliamentary elections, in which this issue arose, the Parliamentary Election Law was amended to provide for validity of an improperly marked ballot provided the intent of the voter is clear. In case of certain types of improper marking, however, a ballot could still not be considered valid. The current provisions are repeated without modification in Art. 81 of the Draft Law.[24$$]

  The effort to address this issue does not appear completely satisfactory, however, since the additional provision on voter intent appears to be in conflict with that concerning the prescribed form of completing a ballot. Also, while additional rules are established in Art. 81(3), there is no provision for supplementary rulemaking or instructions by election authorities.

[24$$] Art. 81of the Draft Law reads as follows: "The ballot is valid if it has been circled in the way prescribed (…) and has the corresponding serial number. A valid ballot is considered to be one from which in a reliable and unambiguous way may be established which candidate, that is list of candidates, the voter has cast his/her vote for. The ballot is invalid should it not be completed, should there be more than one list of candidate, or lists of candidates circled, and should it be without a corresponding serial number."

- The *appeals* provisions of the law should be reconciled so that inconsistent rulings do not occur.[25$$]

  The main point of the OSCE/ODIHR report on this subject is that under current law potentially conflicting avenues of appeal – to the Supreme Court or the Courts of Appeals – were available to election participants aggrieved by actions of the SEC and ECs. Under the Draft Law, complaints by election participants (list submitters) would be submitted to the SEC, and appeals from decisions of the SEC on the complaint would be referred to the Supreme Court (Art. 98). Complaints by voters would be brought to the relevant EC, and appeals from decisions of the EC would be referred to the competent Court of Appeals (Art. 99,3).

  These provisions appear to address the main issue raised by the OSCE/ODIHR in 1998, and may prevent "forum shopping" by election participants seeking a favorable court decision. On the other hand, there would still seem to be a possibility of inconsistent rulings between the Supreme Court and the Courts of Appeals, and among the Courts of Appeals themselves, in situations involving complaints by voters. While there is provision for reconsideration of decisions by the Supreme Court and Courts of Appeals (Art. 100,3), there is no explicit provision for further appeals in order to reconcile conflicting authority.

- The administrative problems occurring in the 1998 elections should be rectified well before future elections. *Security for sensitive voting materials* should be increased, especially after completion of the count.

  Some of the administrative problems noted by OSCE/ODIHR in 1998 included defects in the recruitment of EC members; the need for surplus ballots in areas with high turnout; numerous instances of group voting; intimidation by party activists around polling stations, and inadequate security for sensitive voting materials prior to delivery to the EC. Many of these are susceptible only to administrative, not purely legal remedies, although expanded legislative authorization for related activities by government agencies and electoral bodies could greatly encourage and facilitate such action.

  On the issue of improved security for voting materials, it should be noted that Art. 79 of the Draft Law requires the police to secure the polling station after closure of the polls, and that the police also provide security to EB members until the results and other electoral material are delivered to the EC.

- *Comprehensive public education and election worker training* programs should be instituted to combat group and proxy voting.

  This issue is mainly related to administrative and not legal measures. The Draft Law does not contain any provision, such as with respect to the power or organization of the SEC, which suggests a basis for the measures recommended under this heading.

[25$$] *Cf.* OSCE/ODIHR, "Generic Election Disputes Resolution Guidelines", Warsaw, 12 December 1999.

C. System of Representation

FYROM is somewhat unusual in that its system of parliamentary presentation is not specified in the Constitution, where only a size range for the Assembly is determined, but rather through law.

The main innovation that would be introduced by the Draft Parliamentary Election Law is that it would change the existing method of election to Parliament from the current parallel system of 85 members elected from SMDs and 35 by national list PR. The leading alternative contained in the Draft Law is for national PR elections in a single national district, with intermediate election commissions established in 35 regions. A second alternative – continued parallel system with 60 representatives each chosen through SMD and national PR elections – is also referred to in Art. 2, but is not described in detail and could not be implemented under the provisions contained in the Draft Law.

Factors arguing against changing the method of election at this time include the following:

- It seems improbable that political leaders and others could fully assess the effect of a major change in the method of election on their own interests and the welfare of the country in the amount of time available, especially if early elections are called. In fact, a more systematic examination of alternatives should precede consideration of modification of the system of representation.

- Changing the method of election just prior to the next parliamentary elections could also give rise to suspicion that a political deal had been reached about the composition of the next Assembly. Elements on different sides of public opinion might have a greater opportunity to challenge the legitimacy of the political system.

- In addition, there is the danger that concentrating on the method of election would greatly detract from the practical need to effect changes in election administration before the next elections. Over the longer term, however, reconsidering the system of representation in Parliament should definitely be undertaken in an attempt to reach a system that could become widely accepted and established in FYROM.

On the other hand, several factors support changing the system of representation at this time, at least in a temporary manner:

- Running parliamentary elections based on a national list PR contest would be relatively streamlined administratively, and permit better supervision of operations at a smaller number of ECs.

- There will be less need for geographically based representation in Parliament in the future, since strengthening of local self-government is called for under the FA. The election districts adopted for SMD elections at this time would undoubtedly be different from whatever laws on election districts and municipal boundaries are to be adopted through legislation on that subject under the FA.

- National PR elections will not require a double ballot or a second round election in some SMDs. Actually, both these issues could be addressed without eliminating the

SMDs, through redesigning the mixed system of representation. One possibility would be to base the national PR results on the total number of votes received in SMD elections and not a separate vote. Another possibility would be to establish that election victories in the SMDs be decided in a single round based on a relative majority, although this could lead to the election of candidates disfavored by a majority of the voters in some districts.

The choice of system of representation in Parliament is first and foremost for the country to decide, based on its own characteristics and objectives.[26$$] The choice of a national list PR system is entirely sensible based on the second set of factors adduced above. Moving to such a system will, however, place even greater emphasis on implementation of the provisions of the FA related to local government in order to reassure the different communities that their interests are fairly represented. Continued dialogue, including through the Committee for Inter-Community Relations to be established under the FA, will be very important. Also important will be the anticipated changes in the roles of the agencies of the national government, including the Security Council, Judicial Council, Constitutional Court, Public Attorney, and of course Police.

One practical concern should be mentioned in connection with observations of conduct during past elections in FYROM. Basing parliamentary elections solely on a national PR system will provide a strong incentive for people in various regions to inflate their vote in favor of certain parties. The widespread intimidation and coercion of voters, as well as fraudulent practices including ballot box stuffing, could actually worsen if the incentive for raising the vote total a party receives locally increases.

For the proposed PR system to retain its integrity and credibility it will be necessary for authorities at all levels to conduct aggressive programs of public education, monitoring the vote-getting practices of political parties and their supporters, supervising election officials closely, and undertaking vigorous enforcement efforts. Some of the improvements in security contained in the Draft Law can be helpful in this respect, but cannot possibly address the full extent of the problem of fraud and other violations revealed in previous elections.

D. Election Bodies

The most important issues concerning elections in FYROM have involved election administration, not the election laws. The Draft Parliamentary Election Law would make various amendments to the law governing election bodies and election procedures, but would not appear to go far toward improving election administration through pro-active programs of information, education, rulemaking, training, supervision and enforcement.

With respect to election bodies the intent of the Draft Law is to strengthen the independence of the commissions and boards through increasing the number of judges and other legal professionals appointed. At the same time, however, existing shortcomings and ambiguities in the law regarding the appointment, operation and responsibilities of election bodies are not completely addressed.

[26$$] *Cf.* OSCE/ODIHR, "Guidelines for Reviewing a Legal Framework for Elections", Warsaw, January 2001. For a thorough discussion of the relevance of alternative systems of parliamentary representation for FYROM, see IFES, "A Practical Guide to Electoral System Design: Goals; Essential Characteristics; Advantages and Disadvantages" (Skopje, May 2001).

Appointment of Election Bodies: Art. 12 of the Draft Law provides that the SEC will be "composed of a President, eight members and their deputies." There is also a Secretary, with a deputy. The members, secretary and their deputies are all appointed by Parliament. It is not clear whether members' deputies are full members of the SEC, in the sense of having voting and other privileges. With respect to deputies, all that is said is that they are supposed to be present – with the right to vote or not is unspecified – when the relevant member is absent.[27$$]

This interpretive problem is complicated by the provision of Art. 13(6) that the secretary of the SEC "is not a member of the electoral commission and is not allowed to vote." Under the usual rules of statutory interpretation, this provision may create a negative implication with respect to provisions which do not contain a similar restriction.

Thus, it might be presumed that deputies of SEC members are themselves members and do cast a vote. This impression is reinforced by the new provision that deputies as well as members appointed to the core membership of the SEC are also judges of the Supreme Court or Court of Appeals. Similar issues exist in the Draft Law with respect to deputies to members of the ECs (Art. 15) and of EBs (Art. 19).

Under Art. 13 of the Draft Law, the President and other members of the SEC, appointed on account of their office of judges, either of the Supreme Court and of the Courts of Appeals, as well as their deputies, receive five-year terms. Art. 13(5) adds to this that the Secretary and his deputy serves a similar term.

Art. 13 also provides for designation of members (plus their deputies) to the SEC by the governing and main opposition parties. Under Art. 13(4), the political party designees are nominated within 30 days of the convening of a new Parliament; they do not receive a definite term. Presumably, they could be replaced if the political alignment of the governing or main opposition coalition changed.

The provisions in Art. 16 of the Draft Law regarding political designees on the ECs are somewhat parallel, but appear to contain the same contradiction which is present in current law. Under Art. 17(1), the party designees are proposed by the leading parties 15 days after announcement of elections. In accordance with Art. 16(4), they would be appointed for four-year terms. But under Art. 16(4), these members are to be nominated within 30 days of the nomination of comparable SEC members under Art. 13(4) – *viz.,* 30 days after the convening of a new Parliament.

Composition of Election Bodies: The provisions in the Draft Law related to electoral bodies would increase the number of independent or professional persons appointed to them. These include judges of the Supreme Court and Court of Appeals in the case of the SEC, judges of the Primary Court for the ECs, and lawyers for the EBs. This factor has been cited by the proposers as one of the major improvements that would be made through adoption of the Draft Law.

It should be welcomed that EB chairman will have legal training and experience. It should be noted with respect to judges, however, that not all commentators agree that they are the professionals best equipped by training and experience to conduct effective election

[27$$] Draft Law, Art. 12(3)

administration. While oriented toward unbiased and law-based decision making, judges often have little administrative experience and are sometimes not aware with the need to communicate their decisions and implement them through administrative measures. Increasing the number of judges could in fact have a paradoxical effect. Basing management of the election system on legally oriented professionals could result in a need for greater administrative efforts by other state bodies, including government agencies. Rather than enhancing the independence of election administration, increasing the number and ratio of judges on electoral bodies could make the state role even more dominant.

Operational Aspects: The Draft Law establishes that the core members of the SEC and ECs serve 5-year terms (Arts. 13,1 and 15,4). This is a beneficial provision, in that it takes their appointment out of the political cycle, and potentially provides for continuity in election administration.

Unfortunately, however, it would appear that – both legally and programmatically – the SEC and ECs perform few if any functions between election periods. This would be the time for important rulemaking, consultations with political parties and civil society, administrative action, including preparations for election monitoring and enforcement, and other programs, such as public information and voter education campaigns.

The Draft Law does not appear to expand the legislative basis for election commission operations between election times. In addition, an earlier proposal by the Working Group to provide a Secretariat for the SEC was omitted from the Draft Law. A secretariat would be especially helpful in developing ongoing programming as well as increasing the operational effectiveness of the commissions during elections.

E. Election Procedures

Previous OSCE/ODIHR missions have observed numerous issues concerning the security of the vote during FYROM elections. In addition, they have identified various other procedural problems. This section will address security, procedural issues as well as other characteristics of the electoral process identified by OSCE/ODIHR or otherwise raised by the provisions of the Draft Parliamentary Election Law.

Voter Identification*:* Art. 73 of the Draft Law would create a new procedure for checking voters and issuing them ballot-papers. Similar to current law, however, Art. 73(3) provides that the voter proves his identity with an identity card or passport.

Voter Security: The requirement for presentation of a voter card (VC) would be eliminated in Art. 72. Previous OSCE/ODIHR observations found that the VC program was very problematic, and that many VCs were uncollected and also possibly misappropriated.

Art. 73(1) provides for the voter to be checked whether the appropriate finger has been marked (*i.e.*, by ink spray). Under par. 3, after the voter is issued a ballot the finger is marked. While the nature of the "mark", and the "device" used to apply it, are unspecified, a new explicit responsibility would be assigned to the SEC, under Art. 27(19), to prescribe these matters.

Voters in some countries often object to having ink applied to their finger. There is also question concerning the efficacy of invisible inks. Furthermore, if voters can only vote at

their assigned polling stations (as is the case in FYROM), it seems preferable to take care of voter security through recordation at the station. Ink sprays have been used in the region in recent years, however, for example in Montenegro/FRY in 1998.

Voter Recording: Current law provides no means through which evidence that a voter had received a ballot was retained at the polling station. The only evidence of voting was a stamp on the VC, which the voter retained when leaving the station. The only indirect evidence of voting was entered by the election worker, who circled the ordinal number of the voter in the voter registry (VR). The latter requirement is retained in Art. 73(4) of the Draft Law, which also requires the voter to enter his fingerprint next to his/her entry in the VR. Some comments are clearly in order on this requirement.

Most electoral jurisdictions require a voter to sign the VR. Often, a copy of the voter's signature is already on record as part of the general voter list, and also appears on the VR. Voters who are incapable of signing, due to physical disability or illiteracy, are usually asked to make a mark, which is witnessed; the mark could be a fingerprint, if the voter is willing and able to provide one.

Many people are suspicious of fingerprinting, which is widely used for criminal investigation purposes. They usually have no difficulty in providing a signature, if they are able to make one. It is unclear whether people who are illiterate would feel stigmatized as a result of having to make a fingerprint or other mark, while others sign their own names.

A system of voter recording, based on the leaving of a mark whether fingerprint or signature, should be accompanied by centralized record keeping of the mark. Otherwise, the leaving of a mark would be virtually useless as the basis of an election appeal – although it might have value in a subsequent criminal investigation. On balance, it might be recommended that a signature be preferred to a fingerprint as a means of recording voters. The only strong argument to the contrary is that illiterate voters might feel embarrassed.

If fingerprints were added to voter registration, and a personal computer could be made available at every polling station, then fingerprints could be used as a means of voter identification as well as recording. This would be through the addition of a relatively inexpensive fingerprint reading device to the computer. In this respect, fingerprints may be preferable to signatures; a software program can distinguish fingerprints while signatures are somewhat difficult to recognize. On the other hand, election workers without such a device cannot easily distinguish fingerprints, while they can, however imperfectly, differentiate signatures and can usually tell when a small number of people try to reproduce the signatures of others.

Vote Secrecy: The main problem with vote secrecy observed by OSCE/ODIHR in the past regarding serial numbered ballots, of low quality paper, is not directly addressed in the Draft Law. For the 1999 Presidential elections, the SEC was praised for addressing the former issue by issuing an instruction to shuffle the ballot-papers before issuance to voters. The Draft Law, however, does not take any further action on this point, or even incorporate the previous SEC decision.

Other provisions in the Draft Law may improve vote secrecy by limiting communication through the use of pagers, cell phones and other devices between persons inside the polling

station and those outside. It remains to be seen how effective these provisions will be in practice.

Vote Security: The provisions of the Draft Law on remote and mobile voting, mainly drawn from current law, remain problematic.

Remote voting at certain facilities, outside regular polling stations, is carried out prior to election day. This could be especially problematic for the large number of military votes cast remotely, which opens the possibility that the same voters could vote again at their regular polling stations. (Art. 78)

With respect to mobile voting, while an EB chairman is supposed to notify party designees on the EB of its occurrence, there is no explicit provision for them to be present during the offsite voting or to accompany the mobile team. (Art. 76)

F. Other Issues

Incompatibilities and Conflicts of Interest: Art. 6 of the Draft Law greatly expands the incompatibilities and conflicts of interest to be avoided by parliamentarians. This provision has been identified by the proposers as one of the important changes that would be made by the Draft.

Art. 6(4) would generally make parliamentary office "incompatible with the performance of economic or other profit-making activities". Aside from the wisdom and practicality of such a broad provision, it might be advisable at least to differentiate between salaried positions and commercial/entrepreneurial activities and between earnings and financial gain resulting from personal investments, especially of "portfolio" investment rather than actively managed commercial operations.

Regular Election Date: Art. 9 of the Draft Law provides that parliamentary elections will be held in the first week of November of the year in which the mandate of Members of Parliament expire. This has been identified by the proposers as one of the major advantages of the Draft. It is difficult to understand, however, how this provision could be reconciled with the constitutional provisions that grant members of the Assembly four-year terms (Constitution, Art. 63), and specify that new elections must be held within the last 90 days of an Assembly term or 60 days of its dissolution.

Election Commission Appointments: Art. 15(2) of the Draft Law would continue the current practice of having the SEC appoint members of the ECs. During public discussion of an earlier version of the Draft Law, some political party representatives expressed a preference for EC members to be appointed by the relevant municipal government.[28$$] The latter is arguably in a better position to identify qualified persons, and the SEC does not follow a transparent process in making its selections. In view of the anticipated decentralization of some government functions under the FA, perhaps further consideration should be given to these points.

Women's Representation: The Draft Law provides that 30% of the candidates nominated on lists be women (Art. 31). This has been widely cited by the proposers as an important

[28$$] *See* IFES, "Public Discussion", *op. cit.*

improvement that would be made under the Draft. A set-aside for women candidates in PR elections is not uncommon. Whether it will be effective in significantly raising female representation depends on where the women candidates are placed on the respective lists.

Candidate Nominations: Under the Draft Law, registered political parties would continue to have the right to nominate candidates for national PR races, without submitting signature petitions in support of their nominations (Art. 32). Citizens who wish to nominate a list of candidates must, however, obtain 1,000 signatures (Art. 33). Lists of candidates must be complete; there must be a candidate for each available mandate (Art. 37).

These provisions, taken together, greatly advantage major parties. Smaller parties and/or groups of voters can no longer try to field candidates in SMD races, which would be eliminated under the main alternative for method of election. Although the legislative threshold for PR would be lowered to 3%, it would still be very difficult for small parties or independents to gain representation.

Campaign Finance: Art. 54 of the Draft Law continues the requirement of current law that a special bank account be established 35 days before election day. OSCE/ODIHR previously commented that the requirement to establish such accounts early may have prevented candidacies. The proposed provision, however, is unlikely to present much of a burden to parties fielding national lists. More problematic is the extent to which the requirement for such accounts actually contributes to monitoring campaign finance.

Posting Results: The Draft Law contains a new provision, Art. 84(3), requiring the EB to post the results at the polling station after the count. This provision is welcome, as it will help improve confidence in the results and allow domestic monitoring organizations to arrange for a parallel count.

Tabulation and announcement of results: The procedures for tabulation and announcement of results by the SEC for the proposed national list parliamentary elections are contained in Arts. 89-91 of the Draft Law, which are unchanged from the relevant provisions of the current Parliamentary Election Law (Arts. 93-95). On the occasion of the 1998 parliamentary elections the OSCE/ODIHR observed some difficulties in this regard due to lack of coordination between the SEC and ECs, the latter of which was responsible for declaring the winners of the SMD elections, and differing interpretations of what sort of majority was required to win an SMD election in the first round.

Transparency of the tabulation procedure and timely reporting of initial and final results are extremely important to the legitimacy of the elections process. Access of accredited observers to activities of vote compilation at the ECs level and tabulation at the SEC provides opportunities for neutral observers to assess these activities on behalf of the public, parties that are not participating in the commissions, and the international community. The proposed provisions on election observation (Arts. 101-102) of the Draft Law, discussed previously, do not explicitly ensure access by observers to these phases of the elections. This point should be addressed in the Draft Law itself, or through the procedures to be developed by the SEC for election observation as provided in Art. 101(2).

The Draft Law does not specify the format that should be used for tabulation of results, either at the ECs level or at the SEC. Instead it limits the requirement for this phase of the electoral process to the preparation of "minutes" that will contain information on the aggregated

results (Art. 86 and 90). The OSCE/ODIHR recommends that the legislators clearly indicate in the electoral law that tabulation of results at all stages be done in tables or a similar format that would allow tracing the results of each polling station up through all levels of aggregation to the final result. In addition, provisions should be included specifying that these documents are also publicly posted at all levels of election administration and that copies are available for candidate representatives and observers.

A word should be said about timelines: Art. 84 of the Draft Law establishes that EBs should present the minutes and electoral materials to the ECs "within 5 hours upon the conclusion of voting". In addition, Art. 88 of the Draft Law provides that ECs should submit their minutes to the SEC "within 24 hours", but does not clearly indicate when this time period begins. Under Art. 91, the SEC is to announce initial results of the elections "within 48 hours after obtaining the number of votes won by lists of candidates individually." Presumably, this period begins to run only when complete vote tallies have been received from all the ECs. The 48-hour period may be intended to permit the SEC to consider complaints and appeals prior to announcing any results.

While some delay in publishing initial results may be justified in case of serious complaints that might affect the outcome of the entire election, unnecessary delay is unwise and unwarranted. Perhaps it would be preferable to stipulate in these articles that the SEC should announce initial results as soon as possible, but in any event no later than the time specified.

Loss of Parliamentary Mandate: One of the more controversial provisions of the Draft Law, to date, is the provision on the loss of parliamentary mandate in case a parliamentarian's membership in the party which nominated him is terminated (Art. 94). There does not appear to be a general international standard on this matter, but it could be opportune to limit its application in some manner.

Observation*:* Art. 101 of the Draft Law would improve the current provisions on monitoring by domestic groups and international organizations. The SEC would be given broader power to determine the procedures for observation, which is a positive step, but there is nothing about the ability of the SEC to consult with domestic observer groups about their program. The additional procedures for obtaining approval for observation, contained in Art. 102, do not appear to be unduly onerous.