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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT JOINT OPINION ON THE DRAFT ELECTORAL CODE OF "THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA"

by the Venice Commission
and
the OSCE/ODIHR

on the basis of comments by

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TABLE OF CONTENTS

Page

I. INTRODUCTION

1. Following a request for opinion by the Minister of Justice of the Republic of Macedonia, Ms Meri Mladenovska-Gjorgijevska, on 21 November 2005, the Venice Commission and the OSCE Office for Human Rights and Democratic Institutions (ODIHR) delivered the present opinion on the draft of the Electoral Code, in view of next parliamentary elections.

2. The present opinion is based on:
- The Constitution of the Republic of Macedonia, adopted on November 17th 1991 (Official Gazette Nos. 52/91, 1/92, 31/98 & 91/2001);
- The Electoral Code, working version (CDL-EL(2006)003; undated; unofficial English translation; hereafter "the Draft Code");
- The Law on Territorial Organization of the Local Self-Government in the Republic of Macedonia;
- The Law on Local Elections (Official Gazette Nos. 46/96, 48/96, 56/96 & 12/2003, and 17/97; Decision of the Constitutional Court No. 2/97);
- The Law on Election of the President of the Republic of Macedonia (Official Gazette Nos. 20/94 & 48/99);
- The Law on Election of Members of Parliament of the Republic of Macedonia (Official Gazette No. 42/2002; 25 June 2002);
- The Law on Political Parties (Official Gazette No. 41/94);
- The Law on Polling Stations (Official Gazette No. 50/97);
- The Law on [the] Voters' list (Official Gazette No. 42/2002; 25 June 2002);
- The Law on Election Districts for Election of Members of Parliament (Official Gazette No. 43/2002; 26 June 2002);
- Ohrid Framework Agreement, 13 August 2001, Press Release, Presidential Cabinet of the Republic of Macedonia (14 August 2001);
- OSCE/ODIHR, final reports on elections:
  - Municipal elections, 13 & 27 March, 2005 (Warsaw, 10 April 2005);
  - Referendum, 7 November 2004 (Warsaw, 2 February 2005);
  - Presidential elections, 14 & 28 April 2004 (Warsaw, 13 July 2004);
  - Parliamentary elections, 15 September 2002 (Warsaw, 20 November 2002);
  - Presidential elections, 31 October & 14 November 1999 (Warsaw, 31 January 2000);
  - Municipal elections, 10 September 2000 (Warsaw, 17 November 2000);
  - Parliamentary elections, 18 October and 1 November 1998 (Warsaw, 1 December 1998);
  - Observation of parliamentary elections in "the former Yugoslav Republic of Macedonia" (15-19 October 1998; Doc. 8257, 3 November 1998)
- Parliamentary Assembly (APCE) and Congress of Local and Regional Authorities of the Council of Europe (CLRAE), final reports on elections:

- APCE, Ad hoc Committee to observe the presidential elections in "the former Yugoslav Republic of Macedonia" (31 October and 14 November 1999; Doc. 8604, 22 December 1999);
- APCE, Ad hoc Committee to observe the presidential elections in "the former Yugoslav Republic of Macedonia" (31 October and 14 November 1999; Doc. 8604, 22 December 1999);
- APCE, Observation of parliamentary elections in "the former Yugoslav Republic of Macedonia" (15-19 October 1998; Doc. 8257, 3 November 1998);
- CLRAE, Report on the Referendum in "the Former Yugoslav Republic of Macedonia" (7 November 2004; CG/BUR(11)75, 15 December 2004);
- CLRAE, Report on the local elections observation mission in "The former Yugoslav Republic of Macedonia" 10 and 24 September 2000 (CG/CP(7)12 rev);
- OSCE/ODIHR, Existing Commitments for Democratic Elections in OSCE Participating States (Warsaw, October 2003);
- Venice Commission, Code of good practice in electoral matters (CDL-AD(2002)023rev);
- Guidelines and Report on the Financing of Political Parties (CDL-INF(2001)008);
- Guidelines and Explanatory Report on Legislation on Political Parties: some specific issues (CDL-AD(2004)007rev);
- Guidelines on Media Analysis during Election Observation Mission prepared in co-operation between the OSCE's Office for Democratic Institutions and Human Rights, the Council of Europe's Venice Commission and Directorate General of Human Rights, and the European Commission (CDL-AD(2005)032).

II. EXECUTIVE SUMMARY

3. The Draft Electoral Code would provide a better integrated and unitary legislative framework for the administration of most elections. The Draft Code would make numerous improvements in the provisions currently included in the main election laws, including the Laws on the Election of Members of Parliament, on the Election of the President, and on Local Elections. In addition, other election-related laws, such as those on the Voter List and Election Districts (for parliamentary elections) have been incorporated in revised form into the Draft Code.

4. The Draft Code would therefore avoid repetitions and possible discrepancies in electoral procedures. It could be improved as a matter of pure legal drafting and methodology. It contains some articles which should rather find their place in the Constitution of the country.[1] Other provisions which are of the nature of instructions to electoral officials, due to their density of detail, are hardly the matter of an electoral legislation.

[1] *Regarding the announcement of results, Article 123 is an obvious example since it states that before assuming office, the President of the Republic shall give an oath in the Parliament. Such provision should definitely form part of the Constitution. The same concern arises for Article 138.*

5. On the other hand the Draft Code sometimes errs by being too vague.[2] Regarding the electoral system, Article 128 mentions d'Hondt's formula, which would furnish an indication with regards to proportional representation. However, this provision is not sufficient, as there are a number of variations of the system known by d'Hondt's name. This is a matter of some importance, as it could have also constitutional consequences. Indeed in some countries it is a matter established by consensus and forms part of the constitutional pact, whether as included in the Constitution itself or in an election law widely agreed upon by the political forces.

6. The Draft Code suffers from an excessive fear that the electorate might be overwhelmed by too great a number of candidates. In this sense it could be seen as too restrictive of the liberty citizens should enjoy to present themselves for election. It does reduce somewhat therefore the choices available for the voters.

7. While the draft unified code is needed in order to safeguard the rule of law and democratic procedure of the elections, the parliamentary procedure of draft legislation should be watched closely to prevent any fundamental changes of the fundamental elements of electoral law. Political parties may be motivated to amend the electoral legislation before the elections in their favour. Temptation for that may rise in the parliamentary procedure of the draft law. It has to be noted that the stability of electoral law is of high importance to avoid any manipulation with the electoral system.[3]

8. Importantly, the Draft Code would make it clear that the State Election Commission (SEC) and other election commissions have the responsibility to supervise the work of subordinate electoral bodies. It is hoped that this will prompt the commissions to take a more proactive approach to addressing irregularities. While the commissions would be empowered to remove subordinate election officials, they would not have the ability to take further disciplinary action. In addition, it is not clear that the SEC would use its supervisory authority to fashion constructive remedies to problems in election administration, or continue to approach such matters primarily through the resolution of complaints seeking the annulment of results and repetition of voting.

9. Some of the other main issues with respect to the Draft Code include:

Composition of Election Commissions: The Draft Code would eliminate the selection of judges for service on election commissions based on nomination by the governing and opposition groups in Parliament, a method which raised concerns about the independence and neutrality of the judiciary. The Draft Code does not contain final provisions on appointment of the presidents and other members of election commissions, however.

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[2] *For instance, it is not enough to say: "according to majority model" or "according to the proportional model" (in Article 3), when it is known that there are different models of one and the other.*

[3] *See Venice Commission Code of good practice in electoral matters (CDL-AD(2002)023rev), II. 2. "b. The fundamental elements of electoral law, in particular the electoral system proper, membership of electoral commissions and the drawing of constituency boundaries, should not be open to amendment less than one year before an election, or should be written in the constitution or at a level higher than ordinary law."*

Language Issues: The Draft Code does not appear to address all the issues regarding the use of minority languages in the electoral process required to implement fully the provisions of the Ohrid Framework Agreement in this regard. While other ways might be found to address the remaining issues, it would be highly advisable to work the legislative details out now as part of a new Code.

Regulation of the Campaign: The SEC would not be granted regulatory powers to take legally enforceable action with respect to persons or entities outside of electoral administration. The regulation of activities related to the election campaign – such as media, broadcasting, campaign violations and campaign finance reporting – would continue to be exercised by other State bodies.

Voters' list: The provisions on the voters' list appear to indicate that a number of important legislative determinations have not been made on institutional responsibilities for voters' list operations or issues. These include the agencies with primary responsibility for maintaining the voters' list and for methodological and technical operations.

10. In addition to these areas, there are numerous other specific issues with respect to the Draft Code. These are laid out in detail in the analysis and recommendations.

III. BACKGROUND

11. The OSCE-ODIHR has deployed election observation missions for several elections, including a national referendum, in the Former Yugoslav Republic of Macedonia. Many of these missions have been expanded to form International EOMs including institutions of the Council of Europe and other international organisations. Following the most recent mission, for the March 2005 municipal elections, the Macedonian authorities indicated their intention to follow up on the recommendations and requested assistance in this regard.

12. With the advice of a Working Group including external representatives, the Government has developed a Draft Code, which received first reading in Parliament in January 2006.

A. ELECTORAL SYSTEM

13. The methods of election for various offices are established under the Constitution and currently through specific election laws for the main types of elections – Parliamentary, under the Law on Election of Members of Parliament; Presidential, under the Law on Election of the President; and municipal councilor and mayoral under the Law on Local Elections. The Draft Code would not change the method of election to any office, which would remain as follows:

- Under the Parliamentary Election Law, which was re-enacted in 2002 with extensive amendments, parliamentarians are elected through proportional representation elections in six districts with equal numbers of available mandates (20) and approximately equal numbers of registered voters. The boundaries of the districts do not correspond to any legal administrative or territorial division. Moreover, Article 128 which make mention of d'Hondt's formula should be further clarified, to avoid controversies on the way the formula is used.

- Under the Constitution, a candidate is elected to the Presidency if s/he obtains an absolute majority of the votes of all registered voters, provided that at least 50%+1 of the registered votes cast a ballot. If not, a second round is held between the two leading candidates and the one who gets more votes is elected President but the above-mentioned turnout requirement remains for the election to be valid. If less than 50%+1 of the registered voters cast a ballot, the election has to be repeated from the outset. Thus, the law provides for the potential of an endless cycle of failed elections.

- Election of municipal councilors is through proportional representation. Mayors are elected directly, and a candidate may win outright by achieving an absolute majority, but only if a quorum of one-third of voters turn out. Otherwise, there is a second round between the two leading candidates in which the candidate who receives more votes is the winner; there is no turnout requirement for the second round and there is no possibility for an endless cycle of failed elections. Under the Law on Territorial Organization, 2004, there are 84 municipalities and an additional local government (with mayor and council) for the City of Skopje, which includes several municipalities.

B. SELECTED ISSUES

14. While international observers have generally concluded that the legislative basis for elections is sufficient for the conduct of democratic elections, they have repeatedly pointed out problems of vagueness, omission and inconsistency in the election laws. Observers have also regularly reported the occurrence of widespread irregularities, some of which are related to limitations in the legislation and its interpretation.

15. The observations made by international observers to date should be kept in mind in connection with reviewing the Draft Code. Some of the main issues that have been raised concerning the legislative basis for elections are as follows:

1. Powers and Responsibilities of Election Commissions

16. The number of duties of the State Election Commission is oversized. The duties could be vested more to the regional or municipal commissions and in the period of elections mainly duties of supervision could be left to it.[4]

[4] *For instance in Article 28-2, section 16, and during local elections, section 17, might hardly be fulfilled.*

17. While election bodies at all levels are responsible under the law to "take care for the legality of preparation and conduct of elections",[5] they have often not asserted supervisory authority over subordinate election bodies. Instead, election commissions have tended to address problems in election administration only in response to formal complaints. The reluctance to take a proactive approach to electoral administration has been especially pronounced with respect to the SEC's role with respect to the conduct of municipal elections.

18. In addition, the commissions have approached complaints very legalistically, with the result that many problems in electoral administration have not been corrected either during the elections or in the period for complaint and appeal. In part, this results from an interpretation of the election laws under which the only remedy for violations is for the SEC to annul the results from polling stations and hold repeat elections there.

2. Composition of Election Commissions

19. There is a State Election Commission (SEC) composed of a president appointed by the President of the Republic; four judges of the Supreme Court who are appointed by Parliament upon nomination of the governing and opposition groups in Parliament; and four other members nominated directly by the same political parties. Observers have reacted negatively to the consequences of the system of appointing judges, since it raises serious issues concerning the independence and neutrality of the judiciary.

20. For Parliamentary Elections, regional election commissions (REC) are formed for each election district. In all types of elections (including state *referenda*) municipal election commissions (MEC) are formed in each municipality and for the City of Skopje. The SEC appoints the presidents of the regional and municipal election commissions from among judges of different courts, based on a 2/3 vote. The regional election commissions also have other judicial members who are appointed upon nomination by the governing and opposition groups in Parliament. While this system might create a certain political balance in electoral administration, it intensifies concern about the effect on the judiciary.

21. Article 22-1 regulates the quorum of election bodies. The wording is unclear regarding whether the majority of members, or members or their deputies, has to be present.

3. Regulation of the Campaign

22. The SEC, which is currently established under the Parliamentary Election Law, does not have regulatory authority over various aspects of the electoral campaign. Instead, the Parliament itself as well as other State bodies adopt policies and take up matters in the various areas pertinent to the campaign – including the media in general, the electronic media, campaign violations, and reporting of campaign finance. While noting improvements in certain areas, especially media and broadcasting, observers have

[5] *See, e.g., Draft Code, Article 28 (1).*

continued to point out various issues, including with respect to equal access of election contestants to the media (especially in connection with advertising) and incomplete and after-the-fact reporting of campaign contributions and expenditures.

23. In addition, it is not regulated whether the proposal made by the body in charge of broadcasting may be amended by the Parliament. If the Parliament is free to change it, is of utmost importance to enforce the principle set out in the code in conformity with principles of democracy, as the Parliament is more politicised and interested in giving more possibilities to larger political parties.

24. Article 73-3 provides "taking away the radio station from the owner". It might be a problem of translation, but it seems strange that only working of radio stations might be interrupted, but not any private televisions or websites.

4. Irregularities at Polling Stations

25. The last area that should be addressed as part of this background is that international and other observers have regularly reported widespread irregularities in election procedures at the polling station level. Many of these irregularities have been of an extremely serious nature, involving organised ballot-box stuffing with the cooperation or even participation of Election Board presidents and members. Often such incidents also include intimidation or threat or actual violence by political activists. The most flagrant violations are geographically localised, and sometimes occur over and over again in the same locations in different elections. Little if any effective sanction has been applied to the malefactors, and some persons have continued to be appointed to electoral boards even after having being involved in past irregularities.

IV. MAIN ISSUES

A. COMPOSITION, STRUCTURE AND OPERATIONS OF ELECTION BODIES

1. Composition

26. In the Draft Code, the term "election bodies" is used to refer to the various electoral commissions – State Election Commission (SEC), Regional Election Commissions (REC) and Municipal Election Commissions (MEC), as well as the Election Boards which conduct the voting. Up to now, election bodies were referred to as "election management bodies", and their composition and establishment has been described in separate legislation referring to various kinds of elections (Parliamentary, Presidential and Municipal).

27. Currently, the composition of election bodies follows a "balanced, mixed" approach – under which a core membership of professionals (on electoral commissions, judges from various courts chosen by lot) is supplemented by members nominated by the main governing and opposition parties in Parliament. As is common in systems of this nature,

the balance of party nominees to appointed professionals increases as the level in the hierarchy of election bodies decreases.

28. Under the current election laws, deputies are appointed for the presidents and members of all election bodies, and this practice would be continued under the Draft Code. In a welcome change, the Draft Code provides greater specifics concerning the formal role of the deputies – namely, that deputies participate in the work of the body only in the absence of a member.[6]

29. Regarding the composition of the SEC, it seems dangerous to have deputies or alternates for the members of the Electoral Commissions (Article 24). The office should be personal and it should not be possible to delegate the functions to others. These are extremely important responsibilities which should not be shirked or rendered less personally accountable. This does not mean that there should not be a panel of possible substitutes, in case a member of the Commissions falls sick or is unable for some other impelling reason to function properly on the appointed date.

30. Article 17 (2) related to deprivation of right to membership in election bodies, is somewhat obscure and stands to be clarified.

a. State Election Commission

31. The Draft Code does not embrace a single approach to the future appointment and composition of the SEC. The Draft would eliminate the nomination of judges for SEC membership by political parties. Instead, judges of the Supreme Court appointed to the SEC would be selected by lot. But there are two alternatives for the balance of membership on the SEC – one calling for six judges to be appointed and the other for four. To these would be added another four members appointed based on nomination (two each) by the main governing and opposition parties in Parliament. So the total number of members of the SEC, in addition to its President, would apparently be either eight or 10.

32. Two alternatives are also included for appointment of the SEC President. One of these would permit the President of the Republic to continue to nominate the SEC President, but subject to approval by a 2/3 majority vote in Parliament. (Appointment of the SEC President by the President of the Republic is viewed by some as inconsistent with the scheme of Separation of Powers contained in the Macedonian Constitution.)[7] The other would be to select the SEC President by lottery from among the judicial members.

33. While either of these approaches could help balance the process for appointment of the SEC President, if selection of the President is done by the other core members then it might be better to do so through a vote rather than a lottery. Otherwise, there could be a

[6] *Id., Article 22 (2).*
[7] *See generally Constitution, Articles 68, 84 & 88.*

situation in which a SEC president would be chosen through a process of a "double lottery."

b. Other Election Bodies

34. Under the Draft Code, other election bodies would be constituted in a way similar to the present. The regional election commissions would be composed of a President, a judge from the Appellate Court; two other judges, from the basic courts; and two members nominated by the governing and opposition parties in Parliament. The municipal election commissions would be comprised of a judge from the basic courts as President, together with four members nominated by the governing and opposition parties. The electoral boards would be composed of nominees from the same parties, with a president appointed by the relevant municipal election commission based on a lottery including attorneys and/or public servants (two alternatives). All judges appointed to election bodies would be selected by lot.

35. According to the alternatives presented in Article 37, the presidents of the electoral boards and their deputies shall be appointed by drawing lots from among the attorneys or public servants. However, the wording does not envisage how the candidate lists are set up or whether all attorneys and public servants have a chance to be elected as the presidents of electoral boards.

c. Related Issues

36. The Draft Code does not contain detailed provisions related to the inauguration or conditions of service on election bodies. Professional appointees to the SEC, regional and municipal election commissions would receive five-year terms, but it is not clear whether existing commissions would continue or a new composition would be appointed under the provisions of the new Code. If so, then the entire professional membership of the various commissions has the potential to be changed all at once, possibly prior to an election.

37. Not only would this approach cause a loss of expertise, but could also lead to questions being raised about the motivations for such extensive turnover. Also, if the SEC and other electoral commissions are reconstituted all at once, then the leading interests in Parliament or within the election bodies would have an opportunity to secure influence over election administration for a lengthy period. For these reasons, consideration could be given to phasing (or "staggering") the terms of new appointees to election bodies so that a regular rotation of membership could be instituted.

38. In addition, there is no provision regarding relieving members of election bodies of their duties only for cause. More precisely, removal should be exhaustively described and reasons for removal be listed in an exhaustive manner.[8] Thus such appointees might be

[8] *See OSCE/ODIHR, Existing Commitments …, Part One, Par. 4.2 (in pertinent part): " … Appointments to election administration positions at all levels should be made in a transparent manner, and appointees*

removed even if they are providing satisfactory service, which could place them under considerable pressure in a time of political competition. Such pressure could be exercised through Parliament, with respect to appointment of the composition of the SEC; or the SEC or lower commissions in terms of their powers (discussed at greater length below) to supervise the work of subordinate commissions and their personnel, removing such personnel if necessary.

39. Finally, it should be pointed out that the nomination of persons to serve on electoral bodies is controlled by the leading parties in the governing and opposition groups in Parliament. This means that these bodies in certain constituencies (such as different parliamentary election districts or municipalities) might not be reflective in their composition of the prevailing ethnic or political balance in those areas.

40. In fact, it is often difficult for political parties to find persons willing to be appointed to municipal election commissions or electoral boards in certain areas. For that reason, it is common for such parties to make an arrangement with another party to fill the seats on certain municipal election commissions or electoral boards – as well as to provide representatives to observe activities at polling stations.

2. Structure

41. The Draft Code is not entirely clear on the overall structure of election bodies, leading to the impression that no determination has yet been made by the drafters concerning to what extent the regional election commissions will operate on a regular basis. One leading article on election bodies lists them as including the SEC, municipal election commissions and electoral boards; and indicates that the regional election commissions would only be formed for parliamentary elections.[9] On the other hand, numerous functions that would appear to be required in various other kinds of elections are assigned to the regional election commissions in other articles.[10]

42. The regional election commissions were originally formed to play a role in parliamentary elections in connection with the new, multi-district method of proportional representation introduced in 2002. Even so, their powers over the administration of parliamentary elections were limited – so that, for example, the regional election commissions were not authorised to announce results or consider complaints and appeals. These limitations would continue under the Draft Code. Also, during the 2002 parliamentary elections the regional election commissions were sometimes criticized – perhaps in part due to their limited role – for their mixed performance.

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should not be removed from their positions prior to the expiration of their term, except for cause." (references omitted).See also the Code of good practice in electoral matters, II. 3.1. f.

[9] *Draft Code, Article 16.*

[10] *See Id., Articles 31 (competencies of the regional election commission), 91 (1) (regional election commissions to deliver election materials to the municipal election commissions).*

43. Thus a determination should be made whether the regional election commissions will play a regular role in election administration, or be activated only for parliamentary elections.

44. Perhaps limiting the role of the regional election commissions to parliamentary elections would be an appropriate approach in this case, since the geographical competence of the regional election commissions includes only parliamentary constituencies and does not coincide with existing territorial or administrative boundaries. In addition, it may be noted that the locations of the regional election commissions does correspond to the regional structure of State agencies.

3. Operations

45. A provision concerning the method of operation of the SEC provides: "The work of the SEC shall be public, and the authorized representatives of the list submitters, upon whose complaints the SEC is deciding, shall have the right to attend the work of the SEC."[11] There is no provision dealing with the openness and access to activities of other electoral commissions.

46. Under existing law, the work of the SEC is supposed to be "open", but in fact there is generally no access by list submitters (other than those represented on the SEC), the press or the public. While public access may be difficult to arrange, it would seem desirable to permit the press and representatives of list submitters to attend all SEC meetings – in the latter case, not only those meetings pertaining to complaints submitted by them.

47. Beyond this, consideration should be given to adopting a formal "open meeting" requirement, under which the SEC would be obliged to conduct its business in meetings, and that those meetings be open (at least to the extent discussed above).

B. SUPERVISORY AND DISCIPLINARY AUTHORITY

48. Under the Draft Code, the SEC and other electoral commissions would be given supervisory authority over subordinate election bodies and officials.[12] The addition of a reference to supervisory responsibility in the competences of these bodies would be an important enhancement of their authority to control electoral administration and correct problems. In the past, the SEC and other election bodies often took the position that they

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[11] *Id., Article 28 (3).*

[12] *See Id., Articles 28 (1) (SEC to "take care of legality in the … elections … and shall supervise the work of the election bodies" [emphasis added]); 31 (regional election commissions to "take care for the legality of the elections and "control the legality of the work of the electoral bodies and undertake measures in the event of determining a violation of the legality of the preparations …, and "control the legality of the work of the municipal election commissions and intervene in the event of determining a violation of the legality of the preparations …"; & 36 (municipal election commissions to "take care for the legality in the preparation and conducting of the elections … and shall supervise the work of the Electoral Boards"; and "control the legality of the work of the electoral boards and shall intervene in cases when violation of legality has been determined in the preparations".*

were not empowered to supervise subordinates and respond to irregularities, instead acting only when a complaint was submitted supported by legally-sufficient evidence.

49. It remains to be seen whether the general attribution of supervisory responsibility to the SEC and other election commissions will effectively address the culture of impunity that has sometimes been observed among election officials particularly at the electoral boards' level. Under the Draft Code, the SEC and other electoral commissions would still have little direct power over subordinate officials, except to dismiss them for cause. The addition of specific provisions on this aspect is, however, most welcome.[13]

50. There is also a provision in the Draft Code aimed at persons who violate the law in connection with an election, preventing them from being proposed to serve on an election body in a later election if their work during a previous election resulted in annulment of results.[14] This sanction does not appear to be broad enough, however, since not all significant irregularities would lead to annulment.

51. One thing that appears to be lacking in the provisions of the Draft Code on the disciplinary powers of election commissions is the power to impose administrative sanctions on subordinate officials who commit or permit irregularities and illegalities in election administration. It could be recommended, therefore, that the commissions, particularly the SEC, be granted the power to recover any funds (including stipends or expenses) provided to violators, and if appropriate impose additional financial sanctions.

A. LANGUAGE ISSUES

52. Provisions of the Ohrid Framework Agreement related to language have been incorporated into the Macedonian Constitution, law and other instruments. Discussion of this issue has tended to focus on the requirement that the language of a recognized minority must be used as a second official language in a municipality in which the population of that minority exceeds 20% of the entire population. The Ohrid Framework Agreement also, however, contains other linguistic requirements, such as the right of persons to have personal documents in their own language, and to communicate with the authorities in that language.

53. It would appear that the Draft Code does not fully implement the Ohrid Framework Agreement requirements, in several respects. Instead, the Draft mainly adheres to practices adopted in recent elections, but even some elements of these practices have not been reflected. It might be the case that these omissions could be addressed through operation of the Language Law or other arrangements. Nonetheless, failing to address the specific linguistic issues related to elections through the Draft Code would continue the uncertainty on these matters and could lead to *ad hoc* and potentially controversial decision making during electoral periods.

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[13] *Id., Articles 28 (1.3) (SEC to dismiss members of election body who act illegally); 31(2.1) (regional election commissions to dismiss members of municipal election commissions in case of illegal activities); 35(2.2) (municipal election commissions to respond similarly to illegalities by EB members).*

[14] *Id., Article 17 (1).*

54. The provisions on language in the Draft Code include the following:

- Election bodies in municipalities which have the necessary minority population are required to use that minority language, in addition to the Macedonian language, as an official language, but only in connection with municipal elections;[15]

- It is not clear in what language (script) voters' list records concerning individuals must be kept,[16] but in any event implementation of any requirement on this subject would be indefinitely deferred;[17]

- Candidate lists in qualified municipalities would be printed in the Macedonian and the relevant minority language, both for presidential and parliamentary elections[18] and municipal elections;[19]

- With respect to ballot-papers, the name of the list submitter and candidate(s) would be printed in a recognised minority language as well as the Macedonian language at the request of the submitter,[20] but bilingual entire ballots would be available only in qualified municipalities during municipal elections there.[21]

55. These provisions appear incomplete in themselves, especially since the implementation of linguistic requirements concerning the official language(s) of election bodies and the languages of ballot papers in qualified municipalities would only apply in connection with municipal elections. Additional comments should also be made on other linguistic issues concerning elections:

56. The provisions in the Draft Code do not specify the language(s) of the title of the ballot-paper and other parts of the heading, including the name of the municipality and polling station. They also do not address whether voting instructions would be printed on the ballot-papers or made available in some other way, and in what language(s). Further, there is nothing in the Draft Code concerning the language(s) to be used in informational posters and official forms.

57. The failure to address the issue of registration of voters in their own script may continue to cause problems. This situation has been observed to have resulted in difficulties in the past with respect to the transliteration in the Macedonian alphabet of the names of Albanian and other minorities that use the Latin alphabet.

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[15] *Draft Code, Article 22 (3).*
[16] *Id., Article 40 (3).*
[17] *Id., Article 183 (1).*
[18] *Id., Article 68 (5).*
[19] *Id., Article 68 (6); (It is not clear why these two related provisions are separately stated, in slightly different forms.)*
[20] *Id., Article 93 (3).*
[21] *Id., Article 93 (4).*

58. All of these issues have been problematic in one way or another in post-Ohrid Framework Agreement elections. In addition, deficiencies have been noted in the provision of an adequate supply of posters in minority languages, and having election officials in areas with a substantial minority population fill out protocol and other forms printed exclusively in the Macedonian language, and where and to what extent such materials must be made available.

D. VOTERS' LISTS

1. General

59. The Draft Code would repeal the existing Law on the Voter List,[22] and substitute for it a part in the Code.[23] To some extent State responsibilities for maintaining the voters' list would remain in flux, as the relevant article in the Draft Code continues to refer to "the body of the state administration in charge of registering the voters' right".[24] In addition, plans to shift technical as well as management activities related to the voters' list to the responsible agency have been deferred, and the State Statistical Office would continue to conduct technical and methodological operations in the interim.[25]

60. Prior to an election, the voters' list is updated and made subject to special inspection by voters. After the voters' list is corrected in response to complaints and appeals by voters it is certified by the SEC. Finally, the SEC is supposed to "sign the voters' list, *i.e.,* the excerpts of the voters' list" before releasing them for delivery to the electoral boards.[26]

61. The latter provision has been interpreted as requiring every member of the SEC personally to sign every extract – one for each type of election being held in every polling station (nearly 3,000 in number). This ritual is exhausting for the SEC members and consumes a considerable amount of their time in a key electoral period (prior to 15 days before an election). It is recommended that this provision be amended in connection with adoption of the Draft Code, so that some other evidence of certification of the extracts by the SEC could be adopted.

62. According to Article 4-3 the voters' list is public while according to Article 48 the voters' lists are displayed to everyone in local districts. Although not directly a matter of democratic elections, the right to privacy and personal data protection, especially concerning voters' addresses, is problematic. The voter's right to personal data protection might in specific circumstances make him or her avoid the publication of his or her name in the voters' list and by that would be denied the right to vote. To avoid such problems,

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[22] *Id., Article 182.*
[23] *Id., Part IV (Articles 40-54).*
[24] *Id., Article 40 (1). The former responsibilities of the Ministry of Internal Affairs have been transferred to the Ministry of Justice, although the Ministry of Internal Affairs and other agencies receiving civil status information would continue to provide that to the Ministry of Justice.*
[25] *Draft Code, Article 183 (2).*
[26] *Id., Article 28 (2.30).*

the voters' list could be made only partially public (concerning names, year of birth and their polling stations).

63. Article 43 prescribes obligation to the Ministry of Internal Affairs to submit data to the voters' list. In paragraph 3 it is not clearly said that data is delivered also concerning persons not yet 18 years old, who turn 18 years old before election day. The present text does not regulate clearly that question.

64. According to Article 53-2 the SEC shall return the voters' list with errors back to the body in charge of registering the voter's right. As the errors may occur sometimes too late because voters have not noticed them early enough or the decisions about the voting rights might be complex and difficult, problems may arise to get the voter's lists without errors before the elections. It would be a better solution to use the lists with errors and make in concrete cases special decisions for the election boards nominating persons with right to vote who have not been entered in the voter's lists.

2. Residence

65. The main issue with respect to the voter's list in past elections had to do with entries, which are thought to have been mainly the names of persons who were residing out of the country, but maintained their residence registration in country. This situation could present opportunities for fraudulent voting by other persons or through ballot-box stuffing. It also makes it more difficult to achieve a possible turnout threshold in those types of elections which require it – namely, first and second round presidential elections; first round mayoral elections; and all kinds of *referenda* - and invites fraudulent practices.

66. The Draft Code specifies that, in order to be eligible to vote, a citizen must have registered permanent residence in the relevant constituency.[27] Citizens who are temporarily working or staying abroad may also vote, in the constituency of their last registered residence in country, provided they have a valid passport and maintain their residence registration.[28] Deficiencies in reporting changes of residential status to the Ministry of Internal Affairs have, however, made implementation of these provisions to the voters' list problematic.

3. Special Lists

67. Special excerpts from the voters' list are prepared[29] to enable certain types of voters to vote at special locations ("special voting") one day in advance of the regular election day.[30] Special voting is limited to voters on military drill or duty, and those who are in detention or imprisoned.[31]

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[27] *Id., Article 5.*
[28] *Id., Article 40 (5).*
[29] *Id., Article 46.*
[30] *Id., Article 113.*
[31] *Id., Article 46.*

68. Special voting is conducted at military locations and places of detention by special electoral boards, or at the nearest regular polling station – the best solution.[32] There are no norms in the Draft Code as to what constituencies special voters would cast their vote in – *e.g.,* in which parliamentary district or municipality. In past elections, the SEC has not made ballot-papers from their regular constituencies available to special voters. It would not seem an insuperable task to do so, however, at least for parliamentary elections.

4. Mobile Voting

69. It should be noted that there is no provision for special lists of voters who are residing in other sorts of institutions, including state-run institutions such as hospitals and *sanatoria.* Lacking the opportunity to vote specially, such voters must request a mobile ballot box ("mobile voting") to be made available to them at their place of residence if they are severely ill or incapacitated. Such requests must be made not less than 3 days before an election.[33]

70. The Draft Code also specifies that the request for mobile voting shall be made "pursuant to the Instruction of" the SEC.[34] During recent elections, the SEC has moved to limit requests for mobile voting of ill or disabled persons by requiring such requests to be accompanied by a medical certificate. There has been considerable variation in the number of requests received in various locations, which may reflect different levels of organization by institutional managers there or possibly by political activists.

71. It is understandable that electoral authorities would seek to limit mobile voting. Not only is there an elevated risk of irregularities in connection with such voting, but numerous requests can strain the voting system. In addition, the three-day period for requests means that ballot booklets have to be opened prior to election day, which raises security issues. At the same time, however, the limitation of requests for mobile voting by ill and disabled voters is of concern; and it would appear that consideration should be given to reinstituting special voting for such voters.

5. IDP Voting

72. A transitional provision addresses special lists for voting by internally-displaced persons (IDP).[35]

E. REGULATION OF THE CAMPAIGN

73. While the Draft Code would enhance the authority of election commissions to supervise subordinate election bodies and officials, it would not enable the SEC to adopt legally-binding regulations applicable to organisations or persons outside election

[32] *Id., Article 113 (3)*
[33] *Id., Article 111.*
[34] *Id., Article 111 (1).*
[35] *Id., Article 183 (3).*

administration. This is evident from the formulation of one of the SEC's enumerated competencies to "give instruction, clarifications and recommendations on the application of the provision of this Law and other laws referring to election matters".[36]

74. The absence of regulatory authority for the SEC is particularly noticeable in the area of the election campaign, broadly viewed. Consideration should be given in connection with the anticipated enactment of the Draft Code to enabling the SEC to adopt, implement and enforce regulations in this area.

75. The absence of direct regulatory authority for SEC means that the various aspects of the election campaign are controlled by other bodies. For example, alleged campaign violations are considered by the primary courts;[37] general media rules are adopted by Parliament and not enforced by any particular agency;[38] broadcasting rules are implemented by the Broadcasting Council;[39] and campaign finance reports are monitored by the State Audit Office and Parliament (but subsequently published by the SEC).[40]

76. The distribution of regulatory authority with respect to various aspects of the campaign may have hindered the development of clear and specific rules and enforcement mechanisms. For example, various deficiencies have been noted by observers in the following areas: Equal access to the media (including on equivalent terms and conditions), especially for paid advertising; unbalanced media coverage of the campaign; excessive or unreported financial and in-kind contributions to campaigners; and strict evidentiary standards concerning alleged campaign violations.

77. According to Article 69 the submitters of candidate lists have right to organise election campaigns. It remains unclear to what extent, if at all, an independent organisation or individual can organise election campaigns without connections to any political parties or lists. Sometimes organisations might wish to analyse all lists related to some specific policies and give their suggestions. In those cases the Draft Code does not regulate the limits for funding such analysis and for advertisements of them. Although according to Article 71-2 the election campaign organiser is responsible in some cases for activities by other persons, the provision is not applicable in such matters. If independent organisations do not have the right for such campaign activities, it is a problematic interference in the freedom of speech.

F. COMPLAINTS AND APPEALS

78. The right to complain to election administration or appeal to the courts is preserved in the Draft Code. Not only list submitters may submit a complaint or appeal regarding electoral procedures,[41] but also "every voter whose voter's right has been violated in the

[36] *Id., Article 28 (2.2).*
[37] *Id., Article 71.*
[38] *Id., Article 74.*
[39] *Id., Article 73.*
[40] *Id., Article 84.*
[41] *Id., Article 149 (1).*

election procedure."[42] The potentially disruptive effect of such widespread appeal rights is offset by legal barriers including standing-to-sue and high evidentiary standards.

79. Substantial improvements would be made through the Draft Code to the article, derived from the Parliamentary Election Law, pertaining to annulment and repetition of voting.[43] This article, in its previous forms, had created difficulties by requiring annulment of the results of voting at a polling station in various circumstances, and was sometimes also interpreted to require repetition of the voting there even if that could not affect the overall result.

80. The new article in the Draft Code would still require the SEC to annul results in a variety of unquantified or loosely-defined circumstances – including "if the secrecy of voting has been violated;" "if the police have failed to respond to a request for intervention … provided there was a need for such intervention and this … influenced the conduct of the voting"; "in case … there is a larger number of ballots in the ballot box than the number of voters who turned out;" and "if some person or persons have voted for other person (persons)."[44]

81. But such mandatory annulments would not require repetition of the voting at polling stations. This would be required only when the total number of voters registered at those polling stations could influence the overall results as decided by the SEC.[45] This might also appear to be a very generous provision for complainants, especially in view of the likely overly large number of voters on the voters' list extract at a polling station. But it should be remembered that in many elections very high and one-sided vote totals have been reported by some electoral boards.

82. In the absence of more general supervisory authority for the SEC in the past, the article under discussion became the main criterion for the SEC in deciding complaints concerning the conduct of voting at polling stations. The severe remedies prescribed in the article limited the SEC's ability to fashion more flexible remedies, such as nullifying only certain ballots. While many complaints and appeals were undertaken, only few were accepted, therefore. The rest were rejected, mainly for evidentiary reasons, even though there might have been good reason to believe that serious irregularities had occurred.

83. According to Article 148-4 submitting a complaint or appeal for the protection of the right to vote via the post shall not be permitted. It could be suggested that in those cases the problem should be still solved, but not with such urgency and the right may in such situation be safeguarded for the next elections. Otherwise a person who sends a complaint has to do it again for the next elections.

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[42] *Id., Article 150.*
[43] *Id., Part IX (Article 152).*
[44] *Id., Article 152 (1).*
[45] *Id., Article 152 (2).*

G. PERMANENT ELECTION ADMINISTRATION

84. In line with the recommendations of international and other observers, the Draft Code provides a basis for the commencement of permanent election administration functions. This is reflected in the enumerated competencies of the SEC,[46] including to adopt a program and standards for education of election officials, establish common standards for election material, prescribe election and related forms, adopt a rulebook and compensation guide for members of election bodies, adopt an act for the organisation of the professional service of the SEC, establish contact with international observer associations and organizations, and adopt standing rules of procedure for itself and its professional service.

85. As noted, a professional service would be established for the SEC, headed by a Secretary General.[47] Similar provisions are contained in the existing Parliamentary Election Law, but have not been fully implemented.

86. The Secretary General and other members of the professional service would have civil service status. Obviously, the effectiveness of the SEC's permanent operations will depend considerably on the level of regular funding it receives from the State Budget, as well as its success in retaining qualified staff and ensuring their autonomy.[48]

87. Related to what has been said previously concerning the power of the SEC to adopt and implement binding regulations, special consideration should be given in connection to the commencement of permanent election administration functions to authorising the SEC to develop regulations dealing with the entire electoral process, including campaign-related matters. This would put the SEC in an excellent position to develop regulations concerning aspects of the electoral process that other State bodies have not fully addressed.

V. OTHER COMMENTS

88. The comments in this section will be presented as a running commentary. The various items addressed herein are of differing levels of importance. When appropriate, recommendations have also been included in the discussion.

1. Incompatibility/Eligibility for Candidates

89. Articles 7 and 8 stipulate rules on incompatibilities. While it is not uncommon to have systems in which there is incompatibility between being a Minister and at the same time a Member of Parliament, especially when there is a presidential rather than a parliamentary system of democracy, there are valid arguments in favour of retaining the

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[46] *Id., Article 28 (2).*
[47] *Id., Article 27.*
[48] *See, e.g., OSCE/ODIHR, Existing Commitments …, Part One, Par. 4.3 (in pertinent part): "Election institutions should have sufficient funding and other state support to enable them to operate effectively. They should be assisted by a professional secretariat, preferably also autonomous, and receive the support and cooperation of other agencies." (reference omitted).*

option of appointing ministers who are also members of parliament. Indeed in some of the more decidedly parliamentary systems, one cannot be a minister without being at the same time a member of parliament. A minister who is also Member of Parliament can interpret much better the feeling of the parliamentary chamber or chambers in the Cabinet or Council of ministers. It is a choice which is usually made on the basis of experience.

90. Article 8 clarifies that the incompatibility of service in the military or security forces with office does not render a person ineligible for candidacy to a parliamentary mandate. Rather, their military or security service would be suspended once they are registered as candidates; and the suspension would be continued if they were elected. In the past, there was disagreement over whether persons in the security services could seek election. It is unclear, however, why this provision is drafted to apply only to parliamentary office, and not other elections (including presidential and municipal ones). Although it is conceivable that such persons could misuse their office as candidates, it is unclear whether they still receive salaries during that period. Their right to stand for elections will be restricted in practice if they have not any income during the period of elections.

91. Experience has shown that it is not wise to have the employment of an elected Member of Parliament terminated upon election. Perhaps having it suspended for the length of the period of the mandate plus some further months would be less discouraging.[49] A Member of Parliament who is not reelected may thus fall upon his previous occupation or position. It is not useful to have the prospect of non-election as well as that of having lost one's career progression and job, discourage promising young candidates.

2. Incompatibility of Electoral and Other Official Service

92. The Draft Code provides that certain forms of official State service are incompatible with membership on the SEC.[50] This is welcome, since during past elections observers noted the incompatibility between the regular official responsibilities of certain SEC members and their work on the SEC. On the other hand, the language of the provision is not completely clear, and consideration should be given to redrafting it in an appropriate manner.

3. Mandate

93. Every country fixes the length of the term of the political mandate of its Parliament.[51] One does however observe that in many countries, which had tried a three year or a four year term, the period has been extended to five years. Considering the time span necessary to implement certain plans, it is seen as more conducive to good government if the term is fixed at five years.

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[49] *Draft Code, Article 7-7.*
[50] *Id, Article 17 (2): "A person may not be a member of the State Election Commission if s/he has been elected and appointed by the Parliament and the Government …, provided that this Law does not regulate it in a different manner."*
[51] *Id., Article 14*

4. Candidacies

94. According to Article 56, a candidate for President cannot appear on more than one party list, which is too restrictive. A particularly respected candidate for President, though not exclusively attached to one party, might be the best choice for more than one party, and a number of parties should be free to propose him, even if they propose their own party choice for other functions in the state.

95. According to Article 86, the competent election commission shall make a decision to annul the list of candidates if with an effective court decision it has been established that funds obtained from criminal offences have been used during election campaigns. It is unclear by whom the criminal offence has to be committed. If the donor obtained the funds by criminal offence, it could be easily unforeseeable to the campaign organiser and the restriction could be disproportionate.

5. Parliamentary Immunity

96. According to Article 6-2 the right to be elected is denied, when the person has been given a final court decision of imprisonment of not less than 6 months. It is unclear, whether the right is denied forever or only when the person is still serving the sentence. If the right to stand for election is deprived for the lifetime or even a longer period, a question of proportionality may arise. It should in the principle be a decision of the voters, who should be elected.

97. There is a very sweeping statement in one article that membership in Parliament cannot be revoked,[52] but another article does provide for termination of mandate in certain circumstances.[53] It would appear that the first article is unnecessary, and that the second could serve as a reasonable but limited basis for terminating a parliamentary mandate. Aside from circumstances necessarily leading to loss of mandate (e.g. resignation, incompatibility of office, death, and legal incapacity), this article provides for automatic termination in the event a Member of Parliament is convicted of a criminal offense for which a sentence of at least five years is prescribed.

6. Financing of the election campaign

98. Whilst it would be convenient for checking purposes, were the submitters of candidatures to funnel all their receipts and expenses through a giro account, it would be naïve to imagine that no other ways are found to support financially a candidate's campaign.[54]

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[52] *Id., Article 9 (1).*
[53] *Id., Article 153.*
[54] *Id., Article 70.*

99. One has to apply some common sense to curtail excess expenditures, through the monitoring of the evidence of money spent: television spots, posters, postal campaigns, costly brochures, and payments to agents.

100. Election campaigns are usually not a one-time effort. After a particular campaign, the remaining funds are usually carried forward for the next party campaign, whether general, municipal or referendum, or utilised for the continuing political activities aimed at persuasion in view of future campaigns. It should not be seen as improper to maintain a campaign chest between elections. Candidates who are already well-known will have an increased and perhaps unneeded advantage if they are reimbursed in proportion to the number of votes in favour. Therefore Article 84.6 should be amended.

101. According to Article 83 the election campaign organiser may spend no more than 15 denars per registered voter in the election district for which they have submitted a candidates' list. It remains unclear how the provision should be applied in cases where the campaign is organised in television, radio and other mass media covering all the country. The problem is especially stressed in local elections and financial reports submitted to municipal election commissions (Article 84-5).

102. Moreover, it would be unwise to reimburse expenses by reason of the votes cast in particular candidate's favour.[55] The vagaries of electoral support are well known and individual candidates should not be expected to gauge correctly their electoral strength, which changes with the change of circumstance. In most countries frivolous or capricious candidatures are mainly discouraged by requiring candidates to make a deposit, which is only forfeited if the candidate does not obtain a minimum number of votes (say one twentieth of the quota in proportional representation, or a similar minimum under other systems). There appears to be no need to heap advantages on candidates who are already well known and who would receive the full rate of reimbursement in the system suggested by the draft. It is not in the interest of democracy to discourage candidacies.

103. According to Article 85-4 the reimbursement of the election expenses is determined by a decision of the Parliament, of the municipal council and the City of Skopje. At the same time, Article 85-1 provides the right to reimbursement in concrete cases and amounts. It seems to be contradictory or at least unnecessary to decide it by the Parliament, etc. Parliament may not decide in any other way other than to reimburse to those campaign organisers who have been successful in the amount prescribed by law.

7. Electoral campaign, rights, duration

104. Under the Draft Code, regular parliamentary elections would be held every four years, usually during the last 90 days of the term of the outgoing parliament.[56] In the past, various efforts were made to specify a precise date for parliamentary elections. It is welcome that it is now recognised that such an effort could not be successful under the Constitution.

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[55] *Id., Article 85.*
[56] *Id., Article 14.*

105. Article 15-2 does not make clear the time limit between announcing the elections and the election day. It is clear that Article 11-4 is not applicable.

106. It is not usual for elections to be announced by an Act of Parliament.[57] In many countries the date is fixed by Proclamation issued by the Head of State. As guardian of the Constitution, the President of the Republic would be in a better position to control any attempt to abuse by political parties. Also one does not see the reason behind the notification to the Ministry of Justice. The independent Electoral Commission would usually be entrusted with the conduct of the election process without involving ministers, who could have some interest in the outcome.

107. According to Article 72-1 the candidates have right to initiate immediately a procedure before the court for protecting their rights, if during election campaign the rights are violated. It could be worded more clearly, whether violations entail also any negative campaigning to discredit competitors.

108. It should be clarified that 20 days should be the minimum number of days for a campaign.[58] It should also be defined as the "proclaimed" period for the purpose of some of the provisions of the law. On the other hand, most election campaigns in the wider sense, last for much longer, sometimes for the whole period of an electoral mandate.

8. Rallies

109. According to Article 79-2 the organiser of the pre-election rally is responsible for keeping the order at the rallies. This is a provision restricting the right to assemble and conduct meetings. It may easily be difficult to keep any malevolent persons from the rallies away. It should mainly be the duty of the police to protect the peacefulness of such rallies.

9. Training of Election Officials

110. The Draft Code would make possession of a SEC training certificate a prerequisite for being appointed to an election body.[59] While it is commendable that a training requirement be applied, it should be clarified that all officials should receive training after appointment, rather than as a condition of their appointment.

10. Signature Petitions

111. Nominations of candidates in a presidential election must be supported by a list of signatures of at least 10,000 registered voters, or 30 Members of Parliament.[60] In other types of election, organisations other than political parties must accompany their

[57] *Id., Article 11.*
[58] *Id., Article 73.*
[59] *Id., Article 17 (1).*
[60] *Id., Article 58.*

nomination of candidates with a petition containing a certain number of signatures of registered voters.[61] The number of signatures required varies according to the size of the constituency in question.

112. Requiring 10,000 signatures would seem cumbersome and not really justified. Lists of these dimensions are difficult to verify properly. If the collection signatures is to be done in the appropriate manner, a candidate would necessarily need to have a well-organised machine behind him or her. On the other hand, a good presidential candidate may have wide grassroots support but lack the kind of organisation that can verify signatures before submitting them. A presidential campaign is strenuous and taxing on candidates and that plus the prospect of receiving a humiliatingly small number of votes, should discourage candidates from submitting their candidature without some indication of possible success. The scale of numbers of the signatures required in the different municipalities should be further simplified into three classes, so as to avoid controversies about inhabitants and requirements. One can never obviate absolutely against the presentation of candidates with very little chance of election: the democratic process must allow for such cases. It is not unknown that signatures are sought and obtained to put up candidatures of people who are clearly unsuitable, just to make a point.

113. The collection of qualified signatures is a relatively controlled process, since the signatures are collected at the offices of the State agency responsible for maintaining the voters' list.[62] But the absence of clear standards for the review of signature petitions makes it very difficult for the competent election commission to make a determination of the validity of a petition either on its own or in response to complaints.

114. According to the Articles 62 and 63 the lists of candidates have to contain among other things information on candidates domicile, profession and working post. It should be considered, whether such information has a legal impact on the candidates list. If a candidate has actually another working post or lives elsewhere, the list probably could be accepted by electoral commission without denying the right to stand for the election. In some countries, such information has only unofficial relevance.

115. According to Article 62-2 in case when a candidates' list submitter is a group of voters, the signatures have to be collected for the candidates on the 30th day from the day of announcing the elections. It remains unclear, however, why according to Article 65-2 there is another deadline for submission of candidate lists different from that in Article 62-2. The collection of signatures is time consuming and could without any obstacles for the competent bodies finish at the same time the candidate lists have to be submitted to the electoral commission.

[61] *Id., Articles 60-61.*
[62] *Id., Article 62 (1).*

11. Candidate Gender

116. In Article 63-5 and its alternative a gender quota is provided. The provision continues the requirement that a list of candidates for parliament or municipal councils (and the City Council of Skopje) must contain at least 30% from each gender.

117. This provision also adds a requirement that this percentage applies to both the "lower and upper part" of such lists.[63] An alternative approach could be to require that out of every three candidates in order on a list, each gender should be represented by at least one.

118. Nevertheless, as there is not a clear provision concerning the length of the list in the draft code, Article 63-5 might not be effective if the list is extremely long (containing more candidates than seats are available in the elections).

12. Gender of Election officials

119. The Draft Code provides that each gender have at least 30% representation in the composition of electoral bodies.[64] Although this provision might be difficult to implement in certain parts of the country, it is welcome since it has been noted informally that electoral boards with female representation have received higher ratings by observers. On the other hand, the language of the provision is vague, and it is not clear that the 30% rule would apply to each election body, or to all such bodies taken together.

13. Registration of Groups of Voters

120. One article requires that submitters of candidate lists fill out a special form and enclose their "registration certificate from the competent court".[65] As stated, the provision would appear to apply to independent slates of candidates – namely, those put forward by "groups of voters". It is of concern, therefore, that this provision would require such groups to register civilly as well as within the electoral system before commencing the nomination process.

14. Recording of Objections

121. In several places, the Draft Code – in requiring objections to be filed by representatives of list submitters – provides that such objections may also be filed within a short period of time (five hours) at the next higher electoral body.[66] This is a desirable provision which addresses allegations during previous elections that party representatives

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Id., Article 63 (5).

[64] *Id., Article 20 (1): "Every gender shall be represented at least by 30% in the composition of the bodies responsible for carrying out elections."*

[65] *Id., Article 64 (1).*

[66] *Id., Articles 100 (4)-(5), 105, 117 (5)-(6) (objections to work of electoral boards), 126 (5)-(6) (objections from other electoral commissions). (There would appear to be some redundancy in the provisions cited related to objections concerning the work of electoral boards).*

were not permitted to enter their objections into the record, especially at polling stations. At the same time, evidence for consideration in complaints should not be limited to those recorded in the minutes.

15. Early Closing of Polling Station

122. One provision permits electoral boards to close the voting early, "in case all the voters registered on the excerpt of the voters' list have cast their votes."[67] It is understandable that some electoral boards, especially in small villages, may conclude their work early. But unless the application of this provision is carefully controlled, it could easily lead to abuses.

123. First of all, most voters' list extracts probably contain names of voters residing abroad, and it not realistic to expect all voters registered there to turn up at a polling station. In addition, the electoral boards – especially in areas with a fairly uniform political orientation, or where representatives of other parties are not present – could be motivated to check off additional names on the extract and add ballots to the box.

124. If this provision is retained, it should be specified that an electoral board may close early only after contacting the municipal election commissions and receiving permission to do so. In making that determination, the municipal election commission should discuss the matter not only with the electoral board president but also the other members of the electoral board and any other authorised persons (party representatives and observers) who may be present.

16. Policing and Security

125. During recent elections the arrangements for policing and security, especially at polling stations, have been steadily improved. The articles on this subject in the Draft Code[68] reflect these improvements, and appear to incorporate sound principles concerning the location and comportment of the police and other security forces around polling stations.

126. Unfortunately, there continues to be no provision specifically preventing unauthorised persons from entering or remaining in polling stations. The only provision on this subject has to do with requests by the electoral board to the police to remove such persons.[69]

17. Method of Voting and Ballot Validity

127. The prescribed method of voting (circling the ordinal number next to the list or candidate preferred)[70] would not be changed from existing law. This method can be

[67] *Id., Article 101 (3).*
[68] *Id., Articles 102-104.*
[69] *Id., Article 103 (7).*
[70] *Id., Article 110.*

confusing for illiterate voters, as well as other voters if suitable instructions are not included on the ballot-paper in the language of the voter. While the contestants in an election could conduct their own voter education activities on this point, many voters may not receive this information and some might find it difficult to recognize the numeral and to mark it correctly.

128. Fortunately, a revised provision on ballot validity would be carried over from existing law (the Parliamentary Election Law).[71] This provision is somewhat problematic, since there appear to be contradictions among its three paragraphs. But the intended result is that in addition to those ballots on which the voter preference is properly indicated (by circling the ordinal number), other ballots would also be considered valid provided the intention of the voter is clear. The exception would be if there are marks in two different places, corresponding to different lists or candidates, on the ballot.

129. It is an urgent matter indeed to provide for a procedure which would protect the right to vote and its free exercise as well as its secrecy**.**[72] It is surely not enough to say that such a matter is urgent: it should be legislated upon in concomitance with the electoral law or even, preferably within it.

130. According to Article 2-2, no one shall be allowed to ask a voter to tell whom he or she has voted. Although the poll on election day is regulated in Article 76-3, it is usual in democratic countries to allow exit-polls. Instead of forbidding anyone to ask about voting decisions, the secrecy of voting could be guaranteed by foreseeing sanctions for the violation of voting secrecy. It is done so in Article 168.

18. No Ballot Reconciliation

131. Unfortunately, the article on counting procedure does not require positive ballot reconciliation to occur prior to the commencement of the count at polling stations. In other words, the voted ballots are not first counted and the number compared to the number of voters indicated as having received ballots, according to the voters' list extract.

132. Failure to reconcile the number of ballots before counting the votes offers opportunities for fraudulent entry of ballots into the count. Lacking a proper reconciliation, electoral boards' members might also be tempted to "force" the number of voters recorded to have received ballots with the number of ballots resulting from the count. At worst, failure to reconcile the number of ballots issued and voted makes it difficult to detect ballot-box stuffing.

133. Even when required, ballot reconciliation is sometimes skipped by election officials who are tired or eager to find out the results of the voting. But this step is extremely important for the reasons mentioned, and it should be required by the law.

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[71] *Id., Article 115.*
[72] *Id., Article 148-1.*

19. Annulling of elections

134. Article 152 provides in detail situations in which the results of elections should be annulled. From one side, the clear provisions in this matter remove any uncertainty and provide better predictability. Still, from the other side, there might be situations which are unforeseeable in the election law. Competent electoral boards should have at least some room for the consideration to annul the results in other situations as well, if violations have happened in the electoral process (e.g. electoral campaign or errors in voters' lists).

20. Voter Quorum

135. Turnout thresholds (minimum numbers of voters to cast their ballots) are required for successful elections in several cases, including presidential elections, mayoral elections (only at the first round) and state *referenda.* When the necessary threshold is not reached, an election must be repeated yet the repeat election(s) may be no more successful. Thus, the law creates possibilities for endless cycles of failed elections (with the exception of the mayoral elections) and, in addition, invites fraudulent practices.

136. In order to avoid a possible endless cycle of failed elections for president, the requirement to repeat the election from the outset if the 50%+1 turnout threshold failed to be met, should be removed from the legislation including from the Constitution. A possible solution would be an election system, similar to the one for the election of mayors.

137. There is no requirement in the Draft Code of a quorum during a second-round mayoral election,[73] but the provisions on mayoral elections nonetheless specify that if a mayoral candidate is not elected in the second round "for any reason" (such reasons have to be specified in an exhaustive manner), the Government of the Republic shall appoint a commissioner to act in the capacity of mayor.[74]

21. Election Observers

138. A part of the Draft Code deals with international and domestic observers in elections, and makes clear that domestic and foreign associations operating in the fields of democracy and human rights, international organisations and representatives of foreign countries may conduct observation.[75] Accredited observers are entitled to observe "the whole election process", although the details of their permitted activities and the basis for limitation are not specified.[76]

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[73] *Id., Article 134.*
[74] *Id., Article 135.*
[75] *Id., Chap. XI (Articles 162-163).*
[76] *Id., Article 163 (1).*

139. The procedure for conducting observation missions shall be determined by the SEC,[77] which under its general powers is also mandated to adopt a code on monitoring of elections "in accordance with international standards".[78] It is to be hoped that the SEC, once established as a permanently functioning body, will develop further specifics on the rules and procedures applicable to observers so that their fullest possible access to electoral procedures is ensured.

22. Parliamentary Election Districts

140. The Draft Code would repeal the Law on Election Districts,[79] which adopted the election districts that were used in the most recent (2002) parliamentary elections. In its place, the Draft proposes a chapter on this subject,[80] including a complete specification of the six election districts by municipality (or part thereof) and polling station numbers.[81] In a different part, the Code also incorporates a standard for the delineation of election districts – namely, that the number of voters in each may not vary more than 3% above or below the average number of registered voters in the districts.[82]

141. There would appear to be a problem in incorporating the delineation of parliamentary election districts as an article in the Draft Code. In future parliamentary elections, depending on actions of a legislative (*e.g.,* redistricting) or administrative (*e.g.,* realignment of polling stations), the delineation of districts by polling station numbers could change. In addition, the relative numbers of registered voters in each district could change as the voters' list continues to be improved.

142. In any of these cases, there would be a possibility that the new delineation of districts would come into conflict with the basic provision concerning the permissible deviation in the number of registered voters in each district. So there could be an irreconcilable conflict between two articles of the Draft Code.

143. It would be preferable, therefore, to address the establishment of parliamentary election districts in some other way. Either the districts could be defined in a separate law, as at present, or the delineation of districts by polling station could be attached to the Draft Code as a separate annex, or schedule. In this way, it would be clear that the delineation is subordinate to the general statutory principles regarding the formation of parliamentary districts.

144. Another issue might be mentioned in connection with the delineation of parliamentary election districts. Perhaps as a result of the re-division of territorial jurisdiction to municipalities under the Law on Local Self-Government, a number of municipalities would now be divided between two parliamentary districts. This may

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[77] *Id., Article 162 (2).*
[78] *Id., Article 28 (2.15).*
[79] *Id., Article 182.*
[80] *Id., Chap. XII (Articles 163-167).*
[81] *Id., Article 165.*
[82] *Id., Article 3 (2).*

complicate the work of the municipal election commissions during parliamentary elections, since some municipal election commissions would be required to interact with more than one REC during such elections.

23. Second round elections, early elections

145. The campaign procedure is not regulated for the second round elections (elections of the President of the republic or mayor). According to Article 73-1 the election campaign shall commence 20 days prior to elections day and shall end 24 hours prior to the elections day. It could be suggested to provide more clearly the time-limits for second round elections, if allowed at all. If the aim is to prohibit the campaign after the first round, serious questions of disproportionate interference in the freedom of speech arise. According to Article 159-2 early elections for mayor shall not be announced if there are less than six months until the regular elections. It could be suggested to keep the vacancy for so long, as the mayor has duties to be filled every day. One possible solution would be to elect the mayor without delay, but provide his or her tenure longer, without holding the regular elections.

VI. CONCLUSIONS AND RECOMMENDATIONS

A. CONCLUSIONS

146. The Draft Electoral Code, consistent with recommendations by international observers including OSCE/ODIHR EOMs, would provide a better integrated and unitary legislative framework for the administration of most elections. (*Referenda* would continue to be addressed through separate legislation.)

147. The Draft Code would make numerous improvements in the provisions currently included in the main election laws, including the Laws on the Election of Members of Parliament, on the Election of the President, and on Local Elections. In addition, other election-related laws, such as those on the Voter List and Election Districts (for parliamentary elections) have been incorporated in revised form into the Draft Code.

148. Importantly, the Draft Code would make it clear that the State Election Commission (SEC) and other election commissions have the responsibility to supervise the work of subordinate electoral bodies. It is hoped that this will prompt the commissions to take a more proactive approach to addressing irregularities. While the commissions would be empowered to remove subordinate election officials, they would not have the ability to take further disciplinary action. In addition, it is not clear that the SEC would use its supervisory authority to fashion constructive remedies to problems, or continue to approach such matters primarily through the resolution of complaints seeking the annulment of results and repetition of voting.

149. Some of the other main issues with respect to the Draft Code include the appointment and composition of election commissions, the use of minority languages in the electoral system, regulation of the campaign period, and responsibility for updating

the Voter List. In addition to these areas, numerous other issues have been identified in the analysis above and/or addressed in the recommendations below.

B. RECOMMENDATIONS

150. The following recommendations follow from the main issues identified in the commentary, as well as some other major issues. (Recommendations concerning additional issues were included in the discussion of some of those issues.)

1. Composition, Structure and Operations of Election Bodies

- The alternative approaches for selecting the SEC President (appointment by the President subject to approval by Parliament by a 2/3 vote or by the core SEC members) are both in accordance with international practices. If the latter approach is followed, then it would be preferable to for the core members to choose the President by vote than through a lottery.

- A decision should be made concerning whether the regional election commissions should be part of the regular structure of election bodies, or only function during parliamentary elections. Consistent with that determination, the articles of the Draft Code related to the responsibilities of the regional election commissions should be modified and reconciled.

- New appointments to election bodies under the Code could be phased in (or "staggered") so that an orderly rotation of membership will occur then and in the future. Members of election bodies should not be removed prior to the end of their terms, except for demonstrated cause established through appropriate proceedings.

- Consideration should be given to assigning places on regional and municipal election commissions according to the parties which won the greatest number of votes in the relevant parliamentary election district or municipal council election, rather than by nomination by the leading governing and opposition parties in Parliament.

- Consideration should be given to requiring that election commissions, particularly the SEC, be subject to an "open meeting" requirement, under which all business would be conducted in public meetings accessible to list submitters and the public (represented through accredited domestic observers and the press).

2. Supervisory Authority of Electoral Commissions

- Electoral commissions, particularly the SEC, should be granted the power to impose administrative sanctions against subordinate election officials who are demonstrated to have been involved in electoral irregularities or illegalities. Such sanctions could include termination and return of salaries and expenses, fines and

other administrative penalties, and disqualification from future service on electoral bodies.

3. Language Issues

- The provisions of the Draft Code on the language of electoral bodies, ballot-papers, forms and other materials should be expanded to include all the issues that have arisen in this connection during past elections.

- An adequate amount of voter information and education materials should be made available in all languages used by constitutionally-recognized minorities, and electoral forms should be provided to electoral bodies located in any municipality in the minority language used by the necessary number of citizens in that municipality (20% or more).

- The provisions in the Draft Code related to the use of minority languages during municipal elections should be extended to apply to all kinds of elections conducted in those municipalities.

- The Draft Code should direct the relevant authorities to ensure that minority voters, especially those minorities which exceed the 20% figure as a proportion of the entire population, are able to have their voter registration recorded also in their own language.

4. Voters' List

- The requirement that the SEC members all personally sign each and every voters' list extract provided to polling stations should be eliminated. Some other means for the SEC to certify the extracts should be devised.

- Consideration should be given to providing special voters (currently military and security personnel, and detainees) to the ballots of their own constituency in parliamentary and if possible municipal elections.

- The ability of voters in other special facilities (such as health care centers) to vote there specially, rather than by requesting mobile voting, should be restored. If mobile voting for ill and disabled persons residing in facilities is retained, then requests for such service should be facilitated and not discouraged.

5. SEC Regulatory Authority

- Consideration should be given to granting the SEC regulatory authority over the entire electoral process, including areas related to the election campaign which are currently subject to regulation by other bodies, including Parliament, the broadcasting authority, the basic courts, and the State Audit Office. These areas

include: Media rules, broadcasting regulations, campaign violations, and campaign finance reporting.

6. Complaints and Appeals

- The SEC should be empowered to fashion more flexible remedies in response to complaints against electoral administration than those which are specified in the main article on this subject (related to annulment of results and conduct of repeat voting).

7. Permanent Electoral Administration

- In order for the permanent electoral administration of the SEC to be effective, the SEC should receive sufficient funds on an annual basis from the State Budget; and the SEC should be enabled to recruit and retain a professional staff that is well-qualified in electoral matters and has a career path that fosters institutional loyalty and an autonomous and professional service.

- The role of the SEC in permanent electoral administration would also be greatly enhanced by granting the SEC broader regulatory authority over all aspects of the electoral process including those outside the electoral system itself.

8. Signature Petitions

- The submission and review of signature lists accompanying nomination petitions should be regulated through a combination of self-enforcing and standard means. Submitters of voter signatures should be limited in the number in the number that can be submitted, and a regular approach should be followed by the relevant election commission in reviewing submitted petitions. In addition, challenges to such submissions based on fraud or other grounds should be permitted.

9. Operation of Polling Stations

- An unambiguous provision should be added to the Draft Code specifying which persons are authorized to enter or remain in polling stations, and requiring the exclusion of all other persons.

- Electoral boards should not be permitted to close early, but if they are then they should be permitted to do so only after receiving approval from the relevant municipal election commission. In granting approval, the municipal election commission should consult with all members of the electoral board as well as any other authorised persons present at the polling station.

10. Ballot Reconciliation

- The provisions on the counting of votes should be expanded to include an explicit requirement that electoral boards, prior to proceeding to count the votes, should count the number of ballots in the ballot box and compare that number with the number of voters who were recorded to have received ballots.

11. Voter Quorums

- Effort should be made to remove from the legislation the requirement to repeat an election from the outset, if a turnout threshold was not achieved, in order to avoid possibilities for endless cycles of failed elections, and prevent possible fraudulent practices .If it is considered that a turnout threshold will enhance the credibility of the election, a turnout requirement could be kept for the first round of a majority election.

12. Parliamentary Election Districts

- The delineation of the six parliamentary election districts should not be incorporated into the Electoral Code as an article. The delineation of districts could instead be included in the Code as an annex or schedule, or enacted through separate legislation.