

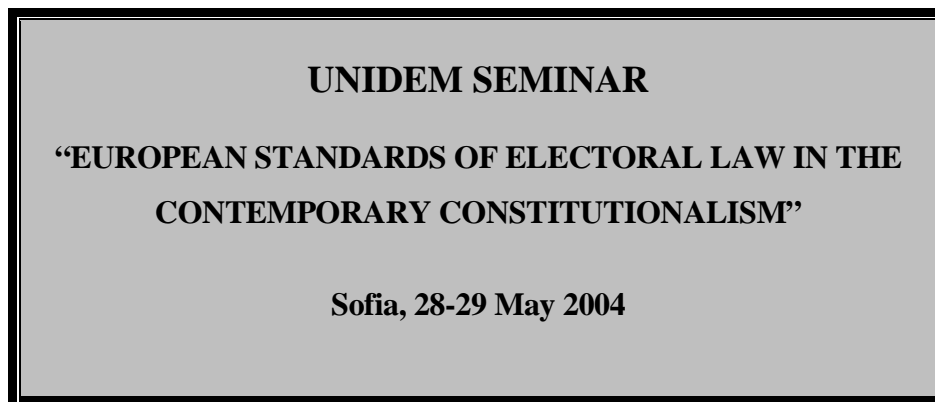


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**THE RESIDENCE AND THE ELECTORAL RIGHT
OF THE CITIZENS OF THE REPUBLIC OF MACEDONIA**

Report by

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Introduction

Free, general, fair and secret elections are a prerequisite of democracy. The rights to elect and to be elected are universally recognized political rights in all of the more significant international documents. The Universal Declaration of Human Rights², in Article 21 paragraph 3, determines that the will of the people shall be the basis of the authority of government; the will of the people shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures. Similarly, pursuant to Article 25 paragraph 2 of the International Covenant on Civil and Political Rights³, every citizen has the right and the opportunity, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status and without unreasonable restrictions to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage held by secret ballot, guaranteeing the free expression of the will of the electors. The European Convention on Human Rights in its First Protocol⁴ in Article 3 also determines that the High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

The Guidelines on Elections, adopted by the European Commission for Democracy through Law on the 51st and 52nd sessions held on 5-6 July and 18-19 October 2002 in Venice, are also very important for European election legislation. In this document, the basic principles underlying Europe's electoral heritage are *universal, equal, free, secret and direct suffrage*. Furthermore, universal suffrage also means that all human beings have a right to elect and to be elected, regardless of sex, religion and ethnicity. This right is, nonetheless, connected to certain universal conditions, such as: age, citizenship and residence. In this contribution the emphasis is placed on the residence as a condition of the right to elect and to be elected. The reasons for this interest are found at international and national level.

At the European level, in particularly among the EU Member States, there are more and more frequent attempts for the residency as a prerequisite in exercising the electoral right to obtain primacy in respect to the citizenship. Hence, pursuant to Article 19 paragraph 8b of the EC Treaty (ECT), all citizens in the EU member counties are entitled to elect and to be elected for the European Parliament as well as for the local elections in the member countries where they

¹ The author is a judge of the Constitutional Court of the Republic of Macedonia.

² The General Assembly of the United Nations on 10 December 1948 adopted and published the Universal Declaration of Human Rights in Resolution 217 A (III).

³ The International Covenant on Civil and Political Rights was adopted and open for signatures with the Resolution of the UN General Assembly on 16 December 1966 and entered in force on 23 March 1976.

⁴ The First Protocol towards the Convention for the Protection of Human Rights and Fundamental Freedoms was determined and put open to signatures on 16 September 1963 in Strasbourg.

reside, regardless of their citizenship, under the same conditions which are stipulated for the citizens in the country where they reside⁵.

At the Macedonian national level the question of residence as precondition of the voting rights is also becoming more relevant, but at the same time politically controversial issue. In what follows the constitutional dimensions of this controversy is described and analyzed. The Constitution of the Republic of Macedonia provides general legal guidelines on exercising the electoral right as one of the fundamental political rights of the citizens.⁶ The subject matter of the Constitution in the area of elections sets forth fundamental principles on which the electoral legislation resides, while the method, conditions, procedure and relations that derive from the electoral right are stipulated in the separate electoral laws.⁷

Pursuant to Article 22 of the Constitution of the Republic, every citizen on reaching 18 years of age acquires the right to vote. The right to vote and to be voted is equal, universal and direct and is exercised in free elections by secret ballot. The Constitution of the Republic of Macedonia in principle does not make any distinction between the active and passive suffrage. The only exception to these constitutional postulates is the provision of Article 80 which addresses the election of the President of the Republic of Macedonia.⁸

In the focus of the interest of this contribution is exactly the last exception in the exercise of the electoral rights of citizens of the Republic of Macedonia. Yet, before that we will first describe and analyse the well established practice of imposing the residence as practical condition for exercising the active suffrage, besides the clear constitutional provisions.

⁵ This approach is aimed at improving the integration of the citizens of the Union into the country where they reside, so for this purpose, Directive 94/80/EU, which addresses the rights related to the local elections, permits all citizens of the Union to elect and to be elected in the local elections in the member countries where they reside without associating this right with the country of their origin. The Directive 93/109/EC lays down arrangements for the exercise of the right of all citizens of the Union to vote and stand as a candidate in elections to the European Parliament, with an alternative to exercise this right in the country where they reside or in the country of their origin.

⁶ Constitution of the Republic of Macedonia (proclaimed with a decision by the Parliament of the Republic of Macedonia on 17 November 1991 and published in the Official Gazette of the Republic of Macedonia no. 52, 22 November 1991. Constitutional Amendments were published in the Official Gazette no. 1/92, 31/98 and 91/2001

⁷ Law on Election of the Members of the Parliament of the Republic of Macedonia (Official Gazette of the Republic of Macedonia no. 42/2002), Law on Election of the President of the Republic of Macedonia (Official Gazette of the Republic of Macedonia no. 46/96, 48/96, 56/96, 12/2003), Law on Voters' List (Official Gazette of the Republic of Macedonia no. 42/2002).

⁸ This article stipulates that the President of the Republic of Macedonia must be a citizen of the Republic of Macedonia and on the day of elections a candidate must be at least 40 years old, and on the day of election a candidate must be a resident of the Republic of Macedonia for at least 10 years within the last 15 years.

1. Residence as a Condition for exercising the active electoral right in the Republic of Macedonia

In the Republic of Macedonia, the method and procedure of exercising the active suffrage is connected with the Voters' List which is regulated in the Law on Voters' List⁹. The Elections for Members of the Parliament of the Republic of Macedonia, for President of the Republic of Macedonia, Local Elections, as well as referendum voting on the local and national level are conducted based on the Voters' List. Pursuant to Article 6 of the Law on Voters' List, all citizens who have turned 18 years of age, have residence on the territory of the Republic of Macedonia and who have a valid personal ID card or passport are registered in the Voters' List.

All citizens of the Republic of Macedonia, who are temporarily working or staying abroad, with a residence on the territory of the Republic of Macedonia and with a valid passport, are also registered in the Voters' List. These persons are registered according to their last place of residence in the Republic of Macedonia, prior to their departure abroad. This clearly indicates the determination of the legislator to use residence as a basis for allocation of the citizens (who have a right to vote) in the Voters' List. Hence, persons who have an active suffrage can exercise it, if they have or had a last residence on the territory of the Republic of Macedonia prior to their departure abroad, regardless of their place of residence in the country or abroad.

The method of registration of the new residence and the cancellation of the old residence or temporary residence as well as the registration of the change of the address is regulated with the Law on Registration of Residence and Temporary Residence of the Citizens¹⁰. According to this Law, a residence is defined as a place where a citizen settles to live permanently in a provided dwelling. A citizen has dwelling, if he or his family can move in, on the basis of ownership or on the basis of a contract for using the dwelling in accordance with the law.

The personal ID card is used as a proof for residence, citizenship and personal identity of the citizens of the Republic of Macedonia. This document is issued in accordance with provisions of the Law on Personal Identification Card and the Ministry of Internal Affairs is an authorized body for its issuing. Since citizens are recorded in the Voters' List according to the municipality where their permanent or last dwelling is located, the Ministry of Internal Affairs is obliged to send the following data to the Ministry of Justice: data for persons who reached 18 years of age and who have a valid personal identification card or passport; data for deceased persons; data for persons who moved from one to another residence and changed the address accordingly; data for persons who changed their name or last name; persons who are granted citizenship of the Republic of Macedonia or who have lost it; persons who reached 18 years of age and live or work temporarily abroad; persons who emigrated from the Republic of Macedonia with information on the foreign country where they reside.

One question arises from the aforesaid facts: why did the legislator decide to follow the concept which connects active suffrage, i.e. a right of a citizen to vote, with a residence? In the case of Macedonia, a connection between a right to vote and a residence in the Republic of Macedonia

⁹ Law on the Voters' List was published in the Official Gazette of the Republic of Macedonia no. 42/2002. According to the data from the State Election Commission, there were 1,339,021 voters in the Voters' List in 1990; 1,360,729 voters in 1994; 1,572,976 voters in 1998; 1,664,296 voters in 2002, and 1,695,103 in 2004.

¹⁰ Law on Notification of Residence and Temporary Residence of the Citizens was published in the Official Gazette of the Republic of Macedonia no.36/92

derives from the requirement of designing a methodology for developing and data processing of the Voters' List according to residence as a fundamental condition. This determines the distribution of the polling stations, and accordingly results in the structure of lay out of the electoral districts. Due to the lack of legal prerequisites, citizens who are abroad on Election Day cannot exercise their right to vote, unless they come to Macedonia and cast their vote in the polling station located in the municipality where their last residence was, before they left the country.

Also deprived of the right to vote is another category of citizens who meet all general conditions for voting, except the one which stipulates that a voter has to have residence or last residence on the territory of the Republic of Macedonia. Although Article 4 of the Law on Election of Members of Parliament of the Republic of Macedonia stipulates that every citizen of the Republic of Macedonia who has turned 18 years of age and has working capacity, has a right to vote, the Law on Voters' List stipulates that citizens who have a right to vote, but who also have a residency on the territory of the Republic of Macedonia or who work or live abroad temporarily and have a last residence on the territory of the Republic of Macedonia, are recorded in the Voters' List. This means that the persons who were born on the territory of the Republic of Macedonia, have Macedonian citizenship and are over 18 years of age; or the persons who were born abroad and are over 18 years of age, [both have never lived in the Republic of Macedonia] would not be recorded in the Voters' List and would not exercise their electoral right¹¹.

For the next elections, the Republic of Macedonia has to find a formula to encompass this category of voters who reside abroad and want to exercise their right to vote, but cannot come to Macedonia on election day. An additional argument is the fact that the number of citizens, who are effectively connected to Macedonia, although they do not have a residence in their country of origin, is large. It should be also taken into consideration that neither the Constitution, nor the Law on Election of Members of Parliament of the Republic of Macedonia, connects active suffrage with general condition for residence as a residential prerequisite.

2. Residence as a precondition for exercising the right to vote and to be voted in the elections for members of the Parliament

According to the Constitution of the Republic of Macedonia, the Parliament of the Republic of Macedonia is a representative body of the citizens and holder of the legislative power in the Republic. The method, conditions and procedure for election of the representatives in the Parliament of the Republic of Macedonia are regulated by a law which is passed by the majority of votes of the total number of representatives.

The law on Election of the Members of the Parliament was passed immediately prior to elections in 2002. This Law stipulates that 120 members of the Parliament are elected in a proportional model according to the proportional model and parliamentary seats are allocated according to the D'Hondt formula. The right to elect and to be elected as a member of the Parliament is guaranteed to every citizen of the Republic of Macedonia who has turned 18 years

¹¹ Not having residence in the country, where a person is a citizen, i.e. staying out of the country for a long period of time a basis for not exercising the right to vote is not unknown in the constitutions and laws in other countries (e.g. Constitution of Iceland from 1944). However, the number of countries which allow their citizens to vote out of their countries is larger (e.g. USA, Canada, Great Britain, and the Netherlands). In the case of the Republic of Macedonia, constitutional prerequisites for this concept also exist.

of age, has working capacity and is not serving sentence of imprisonment for a committed criminal offence.

In a Decision¹², the Constitutional Court of the Republic of Macedonia rejected the initiative for evaluation of the constitutionality and legality of the procedure for election of a citizen for Member of Parliament. The initiative stated that the Law on Election of Members of the Parliament, that allowed the right to be nominated and elected to a citizen of the Republic who at the moment of elections was not residing in the country, was in contradiction with the Law on Voters' List that deprived the same citizen from the right to vote on the base of the residence in the country.

With regard to this initiative, the section which refers to the nature of the electoral right, the Court determined it as groundless because this Article of the Constitution regulates the individual electoral right which is obtained by every citizen who has reached 18 years of age and the method of exercising this right (free elections and secret ballot). Furthermore, the Court determined that the issue of the citizen who was nominated for a member of the Parliament, without recognizing the fact that he did not enjoy the active suffrage because he did not have a permanent residence on the territory of the Republic of Macedonia, was not in its jurisdiction and resides in the jurisdiction of the Primary Courts. This case raises many questions for discussion.

According to the present law, the right to be elected as a member of the Parliament is guaranteed to every citizen of the Republic of Macedonia. It means that, although a citizen has to have or had a residence in the Republic of Macedonia before his departing from the country to exercise an active suffrage, the legal requirement to have or had a residency is not stated as one of the general conditions to exercise the right to be elected as a member of the Parliament as a passive suffrage. This provision of the legislation means that every citizen of the Republic of Macedonia who meets the general conditions can run as a candidate for the Parliament, and does not have to live now or in the past in the Republic of Macedonia. The only legal connection with the state that a citizen who wants to run for a candidate has to meet is to have Macedonian citizenship which can be obtained *ius sanguinius* or *ius soli*, according to the provisions in the Law on Citizenship of the Republic of Macedonia¹³ even though he never lived in the Republic of Macedonia. This approach in the Law on Election of the Members of the Parliament derives from the fact that Republic of Macedonia is a country with a large population, who live abroad, but who maintain relations with Macedonia; although the residences of these people and their successors are abroad, they can run as members of the Parliament. Very often these people have dual or multiple citizenship, which is also recognized by the Law on Citizenship of the Republic of Macedonia.

The Law on Election of the Members of the Parliament does not deal with multiple citizenship or the period between obtaining Macedonian citizenship and running for Parliament. This approach in the Law is completely consistent with Article 17, par. 1 of the European Convention

¹² U. no. 151/2002 dated 5 March 2003 (Constitutional Court decisions are published on the www.usud.gov.mk)

¹³ Law on Citizenship of the Republic of Macedonia is published in Official Gazette no. 67/92 on 3 November 1992 and entered into force on the eight day of its publishing. The Law on Amending and Changing the Law on Citizenship of the Republic of Macedonia is published Official Gazette no. 08/04 on 23 February 2004 and entered into force on the eight day of its publishing.

on Citizenship¹⁴, which stipulates that these citizens enjoy the same rights and duties on the territory of the country where they live as the other citizens in that country. Article 17 “Rights and Duties related to the Multiple Citizenship”, paragraph 1 states the general rule that persons who have multiple citizenship on the territory of the state signatory where they reside, enjoy the same treatment compared to the citizens who have only one citizenship; for example, election right or serving military duty. However, these rights and duties can be changed with international agreements under certain circumstances.

3. Residency as prerequisite for exercising the right to stand as a candidate for election of President of the Republic

In accordance with Article 80 of the Constitution, the President of the Republic is elected in general and direct elections, by secret voting, for a period of five years. According to paragraph 5 of Article 80, the person who on Election Day was not a resident of the Republic of Macedonia for at least 10 years in the last 15, cannot be elected as President.¹⁵

Unlike the constitutional requirement the election of MPs and the local elections to be regulated by law, for the presidential elections the Constitution sets forth the election model, but also the general requirements for the candidates. Namely, it is constitutionally determined that the candidate should be a citizen of the Republic of Macedonia, and also the age [the candidate should have turned 40 by Election day] and the residential status [a person can not be elected if by Election day he/she was not a resident of the Republic of Macedonia at least 10 years in the last 15 years, whereas the time of residency in other republics of the Socialist Federal Republic of Yugoslavia (SFRY) also counts].

The Constitutional Court of the Republic of Macedonia rejected the initiative for protecting the passive electoral right of a citizen who intended to be nominated for presidential candidate.¹⁶ According to the initiative, the decision of the State Election Commission and the decision of the Supreme Court violated an electoral right, contrary to the constitutional provisions and Article 3 of the First Protocol towards the Convention for the Protection of Human Rights and Fundamental Freedoms. Namely, according to the initiator, the State Election Commission and the Supreme Court miscalculated the legal stay of 10 years in the last 15 years, and failed to correctly apply the provisions referred to in Article 132 of the Constitution, which are related to the years of residency of the candidate in one of the former republics of SFRY. The

¹⁴ Republic of Macedonia signed this Convention on 6 November 1997. Parliament of the Republic of Macedonia passed the Law on Ratification of the European Convention on Citizenship on 23 January 2002 and was published in the Official Gazette of the Republic of Macedonia no. 13/02 on 18 February 2002. This Law entered into force on the eight day of its publishing. Instruments for ratification of the Convention are deposited with the Secretary General of the Council of Europe on 3 June 2003 and the Convention entered into force on 1 October 2003.

Republic of Macedonia put a reserve on Chapter III Article 6, par.3 of the Convention and announced that exclude the application of Chapter VII, until harmonization of the national legislation with the provisions of the Convention, and then, pursuant to Article 25 par. 3 of the Convention, the Secretary General of the Council of Europe will be notified on application of the provisions of this Chapter.

¹⁵ The period of residing in other republics of the Socialist Federal Republic of Yugoslavia is also included in the period defined in paragraph 5 of Article 80. Residency, as a prerequisite for a person to be eligible or be a presidential candidate, has also been provided for in the Constitution of Republic of Bulgaria and in Lithuania.

¹⁶ Decision U.no.55/2004, dated 31 March 2004

Constitutional Court rejected the above mentioned initiative, as it assessed that it was not competent to protect the rights and freedoms of the individual and citizen relating to the electoral right.¹⁷

The Law on Election of President of the Republic of Macedonia¹⁸ stipulates the procedure for election of a President of the Republic of Macedonia, due to termination of mandate, as well as the protection of the electoral right. According to this Law, the procedure for protection of the electoral right is urgent and is a responsibility of the State Election Commission and the Supreme Court of the Republic of Macedonia.

Apart from the prescription of the conditions under which a president of the country may be elected, the Constitution also stipulates the election model [majority election model) under which presidential elections may be conducted. The Constitution started from the presumption that the President represents the country abroad and he is the chief commander of the armed forces; therefore, residency as a prerequisite would mean that he is well aware of the circumstances in the country and that he participated in some areas of the life in the country, and thus there is an effective connection and loyalty towards the country.

The implementation of the transitional provision in the Constitution, which stipulates that the time referred to in paragraph 5 of Article 80 includes the time of residency in other republics of the Socialist Federal Republic of Yugoslavia, opened numerous disputes among the legal experts for the above mentioned case. However, the administrative and judicial practice were built at the time when SFRY ceased to exist as a legal entity, or in accordance with the opinion numbers 8 and 11 of the Arbitrary Commission for Yugoslavia. More specifically, a presidential candidate who had residence in another republic of the Socialist Federal Republic of Yugoslavia will be considered that he has residence, which will be counted in accordance with Article 80 paragraph 5 of the Constitution, up to the day when the Republic of Macedonia became independent on 17 November 1991. The date of proclamation of the Constitution of the Republic of Macedonia, as a date when the Republic of Macedonia is considered an independent country, has also been accepted by the Arbitrary Commission (Badenter's Commission). According to some legal theoreticians, the provision of Article 80 paragraph 5 is outdated, because there are more than 10 years since SFRY fell apart.¹⁹

4. Residency as a condition for exercising the right to be elected in the local elections in the Republic of Macedonia

The Constitution of the Republic of Macedonia guarantees the right to a local self-government to the citizens. Units of local self-government are the municipalities, whereas there is a possibility for establishing forms of community governance. The local elections are conducted

¹⁷ Pursuant to Article 110 line 3 of the Constitution of the Republic of Macedonia, the Constitutional Court of the Republic of Macedonia protects the rights and freedoms of the individual and citizen relating to the freedom of conviction, conscience, thought and public expression of thought, political association and activity as well as to the prohibition of discrimination among citizens on the ground of sex, race, religion or national, social or political affiliation.

¹⁸ Law on Election of President of the Republic of Macedonia (Official Gazette of the Republic of Macedonia no. 20/94, 48/99 and 11/2004)

¹⁹ Svetomir Skaric "Comparative Macedonian Constitutional Law", Matica Makedonska, Skopje 2004 (pg.645)

according to a mixed model: proportional and majority. The way of organizing local elections is determined in the Law on Local Elections. The Law on Local Elections²⁰ in its basic provisions stipulates that the citizens elect the local authorities in general, direct and free elections, by secret ballot.

Each citizen of the Republic of Macedonia of 18 years of age, working capacity and permanent residence in the municipality or the City of Skopje where elections are held, has a right to elect and be elected as a member of the council. Each citizen of the Republic of Macedonia with 18 years of age and permanent residence in the municipality or the City of Skopje where elections are held, has a right to elect and be elected as a mayor.

The Law on Local Elections also stipulates that the candidate should have permanent residence in the municipality, as one of the general conditions for citizens to exercise their active but also passive electoral right. This approach is quite understandable if we bear in mind the competencies of local self-government. The citizens cannot be represented by a person who is not familiar with the circumstances in the municipality, nor can he stand for resolving certain issues that have significance for the pertinent municipality. Therefore, the Law on Local Elections quite justifiably prescribed permanent residence as an important condition for exercising the electoral right [both active and passive]. The local elections are of an exquisite importance to the citizens who live in one local community, because that is the place where their everyday problems are being resolved. Consequently, it is understandable that in many countries even the people who do not have citizenship have a right to vote in local elections, if they were staying in the country for a longer period of time as foreigners (for ex. Switzerland). That is also the stream of politics of the countries of the European Union. The Directive 94/80/EC for the rights related to local elections enables all citizens of the Union a right to elect and stand for election in municipal elections in the Member States where they reside, without this right being connected to the residence in the state of their origin.

The intention of the EU regarding the exercising of the electoral right of the EU citizens is clear, which means that gradually the condition of having citizenship should step down in favour of the condition of residency. This is quite understandable, having in mind that due to the free labour market within the borders of the European Union the citizens of the Member States will change residency often in search for a new employment or new investments. The idea of enabling each person with an electoral right to exercise that right within the frames of the community where he lives, and especially for local elections, enables, among other things, a fast integration of the newly arrived members in the local community, but also their involvement in the election of local authorities, since the local authority sustains also with the tax money of the citizens who live in that community.

5. Conclusion

Elections mirror the face of democracy. The right to elect and to stand for election is one of the key political rights, which enables citizens to influence the authorities in the country where they decided to live. When speaking about local elections [in case of the Member States of the EU and the elections for the European Parliament], in a situation of a dynamic society in which frequent changes of the state where one resides do not always result in change of citizenship, it seems that the condition of residence instead of the condition of citizenship, or at least the

²⁰ Law on Local Elections, Official Gazette of RM no. 6/96

condition of residence in addition to the condition of citizenship are of greater significance for exercising the right to vote.

In most European countries residence is accepted as the basis for enabling persons who live on their territory to exercise the right to elect local government and MPs in the European Parliament. Essentially, the intention of the European Union to enable citizens who come from the Member States of the Union to exercise the right to vote in the place where they permanently reside has been clearly specified in several directives.

On the other hand, when speaking about the institution of a president of a country, in not that small number of countries the passive electoral right is connected to residency in the given country. In other countries, they go as far as to have the recent citizens to spend a certain period of time as citizens of that country (for ex. USA). It is an assumption that a president of a country must have an effective legal connection to the state and its citizens.

Parliamentary elections, in their nature, leave space for the electoral right to be exercised regardless of the place of residence, if that has been connected to the state through citizenship.

The permanent building of the election legislation in the Republic of Macedonia tries to follow the stressed tendencies for creating conditions for a more complete and realistic exercise of the constitutionally given electoral right to the citizens.